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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-6108

EMMA ARMOUR, et al.,

Plaintiffs-Appellants,

v.

JACK P. NIX, et al.,

Defendants-Appellees.

On Appeal From
the United States District Court
For the Northern District of Georgia

JURISDICTIONAL STATEMENT

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PRELIMINARY STATEMENT

This case is an interdistrict school desegregation case brought in forma pauperis by black parents whose children attend school in the nearly 90% black Atlanta, Georgia, school district.

Shortly after this case was filed in 1972, defendants moved for the convening of a three-judge district court. Plaintiffs objected on the grounds that the only state laws whose constitutionality was drawn into question either required segregation and prohibited desegregation or interfered with the remedy sought by plaintiffs--issues which do not require the convening of a three-judge district court. A three-judge district court nonetheless was convened, and that court on August 24, 1973, directed that the case proceed both as a single-judge and as a three-judge court case. On September 30, 1977, the court denied plaintiffs' motion to dissolve the three-judge court, and again directed that the case proceed as both a single-judge and three-judge court case.

On September 24, 1979, two identical Final Orders dismissing plaintiffs' claims were entered in this case: one by the single-judge district court and the other by the three-judge district court. On the same date a Final Judgment was entered by the Clerk.

Because of the two separate Final Orders filed by the single-judge and three-judge courts below, plainfiffs have had to pursue simultaneously two appeals from what in effect is the same judgment. Plaintiffs thus filed Notices of Appeal to the U.S. Court of Appeals for the Fifth Circuit and also to this Court.

Plaintiffs currently are in the highly anomalous position of having to file a Jurisdictional Statement in this Court in a case in which they maintain that this Court lacks jurisdic-

tion to hear the appeal, since the case was not one that properly could be heard by a three-judge court.

In this Jurisdictional Statement, plaintiffs first urge this Court to dismiss this appeal for want of jurisdiction so as to allow this case to proceed on appeal in the U.S. Court of Appeals for the Fifth Circuit. To the extent, however, that this Court may decide not to dismiss this appeal, plaintiffs submit that the issues on the merits are so substantial as to justify plenary review.

OPINIONS BELOW

None of the opinions of the district court has been reported.

The August 24, 1973, slip opinion of the district court convening a statutory three-judge district court is attached hereto as Appendix A. The September 30, 1977, slip opinion of the district court denying plaintiffs' motion to dissolve the statutory three-judge district court is attached hereto as Appendix B. The March 2, 1978, slip opinion of the district court dismissing various suburban school districts from the case is attached hereto as Appendix C. The September 24, 1979, slip opinion of the district court dismissing the case is attached hereto as Appendix D.

JURISDICTION: STATEMENT OF THE REASONS WHY THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL

This interdistrict school desegregation case was filed in 1972 by black parents whose children attend school in the Atlanta, Georgia, school district. Plaintiffs--now appellants --alleged violations of the Fourteenth Amendment and of 42

U.S.C. §1983 by the Georgia State Board of Education and its duly appointed members, the Georgia Superintendent of Public Instruction, the Atlanta Board of Education, and six county and three small city boards of education in the Atlanta metropolitan area. Jurisdiction was conferred on the court below by 28 U.S.C. §1331(a), and 28 U.S.C. §§1343(3) and (4).

After plaintiffs filed this case, defendants moved for the convening of a three-judge district court. Plaintiffs objected on the grounds that their challenge was to defendants' unconstitutional actions, and that the only state laws whose constitutionality was drawn into question either required segregation and prohibited desegregation or interfered with the remedy sought by plaintiffs--issues which do not require the convening of a three-judge district court. A three-judge district court nonetheless was convened pursuant to the now-repealed 28 U.S.C. §2281, and that court on August 24, 1973, directed that the case proceed both as a single-judge and as a three-judge court case. See Appendix A. On September 30, 1977, the court denied plaintiffs' motion to dissolve the three-judge court. See Appendix B. Stating that this was one of those "unclear cases," Appendix B at pp.5-6, the court again directed that the case proceed as both a single-judge and three-judge court case, and further directed that the evidence in this case be heard only by the single-judge court. Id.

Following the presentation of plaintiffs' evidence, the district court on March 2, 1978, entered an Order and Opinion dismissing plaintiffs' case against various of the suburban school districts. See Appendix C. A Final Order and Opinion dismissing plaintiffs' case in its entirety on the merits was entered jointly and separately by the single-judge district court and by the three-judge district court on September 24, 1979. See Appendix D. A Final Judgment was filed by the clerk of the district court that same day. Id.

Plaintiffs--now appellants--filed a timely Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit on October 22, 1979, see Appendix E, and also filed a timely Notice of Appeal to this Court on October 22, 1979, see Appendix F. After an Amended Final Judgment was filed in the district court on October 29, 1979, see Appendix G, appellants filed Amended Notices of Appeal on November 9, 1979, to the U.S. Court of Appeals for the Fifth Circuit, see Appendix H, and to this Court, see Appendix I. An Order entered by Mr. Justice Powell on December 13, 1979, extended the time for filing this Jurisdictional Statement to and including February 19, 1979. See Appendix J.

The jurisdiction of this Court to review the decision of the district court below--to the extent that the decision was rendered by a statutory three-judge district court--arguably is conferred by 28 U.S.C. §1253. But this Court's jurisdiction under 28 U.S.C. §1253 is limited to only those proceedings which were "required" to have been heard by a statutory three-judge district court.

As plaintiffs contended below, this proceeding is not one which should have been heard by a three-judge district court pursuant to the now-repealed 28 U.S.C. §2281.[1] If plaintiffs are correct in this contention, this Court is without jurisdiction to hear this appeal.

The "threshold question" in this case thus is whether this Court has jurisdiction under 28 U.S.C. §1253 on direct appeal from the decision of the three-judge district court

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1. Although 28 U.S.C. §2281 was repealed in 1976 by the Act to Improve Judicial Machinery, Pub.L. No. 94-381 (Aug. 12, 1976), 90 Stat. 1119, Congress provided in §7 of the Act that: "This Act shall not apply to any action commenced on or before the date of enactment [Aug. 12, 1976]." 90 Stat. at 1120. Since this litigation was commenced prior to enactment, the repeal of 28 U.S.C. §2281 technically is irrelevant here.

"purportedly convened pursuant to 28 U.S.C. §2281." Moody v. Flowers, 387 U.S. 97, 99 (1967). This Court, of course, does not have jurisdiction unless this "case was one required to be heard by a three-judge court. 28 U.S.C. §1253." Board of Regents v. New Left Education Project, 404 U.S. 541, 542 (1972).

In this interdistrict school desegregation case, plaintiffs as noted alleged that defendants in concert with other state officials had acted in violation of the Fourteenth Amendment and 42 U.S.C. §1983. See plaintiffs' Amended and Substituted Complaint set out in Appendix K. The essence of the remedy sought by plaintiffs from the district court was the transfer of students between various of the ten school districts in the Atlanta metropolitan area[2] in order to eliminate the condition of interdistrict segregation caused by defendants and other government officials. Id.

Primarily to effect this equitable remedy, plaintiffs requested an injunction against certain provisions of the Georgia Constitution and of various state laws.[3] Under the teachings of this Court, none of the relief sought made this case one which was required to be heard by a statutory three-judge district court.

First, because this is a school desegregation case, plaintiffs asked for a pro forma declaration of unconstitutionality and an injunction against the enforcement of "Georgia Constitution, Article VIII, Section I (1945), to the extent that it provides for separate schools for the white and

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2. As plaintiffs contended below, state law already provides a basis for the interdistrict remedy sought by plaintiffs. Specifically, Ga. Code Ann. §§32-628a, et seq., created various interdistrict "Cooperative Educational Services Agencies for the purpose of 'sharing services which are designed to improve the effectiveness of educational programs of member local school systems.'" Appendix D at p.8. Such an agency, M-CESA, exists in metropolitan Atlanta.

3. The provisions are set forth under Statutes and Constitutional Provisions Involved, see pp. 9-12, infra, and are described in Appendix K at pp.38-39.

colored race." See Appendix K at p.38. Ever since Brown v. Board of Education, 347 U.S. 483 (1954), any claim that such a law is not unconstitutional would be "plainly insubstantial," Goosby v. Osser, 409 U.S. 512, 518 (1972), and it thus can be declared unconstitutional by a single-judge district court, Bailey v. Patterson, 369 U.S. 31 (1962).

Second, for the same reasons and in the same manner, plaintiffs sought the same relief with respect to "Ga. Code §32-847, to the extent that it prohibits students from being compelled to attend certain schools on account of race; [and] Ga. Code §32-848, to the extent that it prohibits teachers from being compelled to teach at certain schools on account of race." See Appendix K at p.38. These antidesegregation laws barring desegregation remedies are patently unconstitutional. North Carolina Board of Education v. Swann, 402 U.S. 43 (1971). Thus, any claim that such laws are not unconstitutional is "plainly insubstantial," Goosby v. Osser, supra, and they thus can be held unconstitutional by a single judge, Bailey v. Patterson, supra.[4]

Finally, in view of the interdistrict remedy sought by plaintiffs in the event they prevailed on the merits, plaintiffs sought a remedial injunction against the enforcement of "Ga. Constitution Article VIII, Section V (1945) and Ga. Code §32-901, to the extent that they confine control and management of public schools within counties to a County Board of Education, and Article VIII, Section VII (1945), where such Constitutional provisions conflict with any inter-district remedy adopted by the Court to eliminate unlawful racial

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4. Despite the patent unconstitutionality of the foregoing state laws and constitutional provision, the district court did not enter any relief affecting them. The focus of the court, at least with regard to the convening and maintaining of the three-judge court, was the interdistrict relief sought by plaintiffs in the event they prevailed on the merits. See Appendix A at p.2; Appendix B at pp.3-5.

segregation remaining in Atlanta schools"; and plaintiffs also asked that defendants "be enjoined from enforcing or maintaining the school system boundary lines as provided for in Georgia Constitution §2-7001 as a legal barrier to transfers of students across said lines for the purpose of implementing a school desegregation plan for the metropolitan Atlanta area." See Appendix K at pp.38-39. These concededly valid laws were addressed by plaintiffs not because they caused any violations of the Fourteenth Amendment or of §1983 but because they arguably stood in the way of the federally mandated interdistrict relief sought by plaintiffs. The most that plaintiffs asked for and might have been entitled to was the suspension of those laws to effect their sought-after relief. This falls far short of what is necessary to invoke the now-repealed 28 U.S.C. §2281. As this Court recently held, it is wrong for a lower court to view "the possible suspension of an otherwise valid state statute to effectuate federally mandated relief as equivalent to finding that statute unconstitutional." Costello v. Wainwright, 430 U.S. 325, 326 (1977). In this instance, convening a three-judge district court is inappropriate for it "would require postponing the threshold question of jurisdiction until the merits of the controversy had been fully resolved and the broad outlines of equitable relief discerned. Section 2281 embodies no such wasteful and uncertain mandate." Id. In the instant case, which was dismissed on the merits, the rough outlines of the appropriate equitable relief were not even reached.[5] More so than in Costello, a three-judge district court was not required.

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5. To the extent that any temporary suspension of the challenged state laws would have been necessary at the remedial stage of these proceedings, the injunction would not have had a state-wide effect but would have been effective only in the six-county Atlanta metropolitan area. Accordingly, a three-judge court again was not required. Board of Regents v. New Left Education Project, 404 U.S. 541 (1972); Moody v. Flowers, 387 U.S. 97 (1967).

Seeking to distinguish Costello, the district court stated that no state law had been challenged "on its face," while here "the complaint involves a very real attack on various portions of the Georgia Constitution and statutes of the state of Georgia." Appendix B at pp.4-5. While the district court may have considered the interdistrict remedy sought by plaintiffs to be "a very real attack" on interdistrict school segregation, the fact remains that plaintiffs here had not challenged the constitutionality of any arguably valid state law within the meaning of 28 U.S.C. §2281. As in Costello, the "suspension of an otherwise valid statute to effect federally mandated relief [is not] equivalent to finding that statute unconstitutional." 430 U.S. at 326.[6]

It is not without significance that the three-judge court here, when it formally convened itself, was unsure of the correctness of its decision. The court thus directed that the case proceed as both a single-judge and three-judge district court case, a procedure which it described as "the safest though somewhat cumbersome course." Appendix A at p.2. When the court later denied plaintiffs' motion to dissolve the three-judge district court, the court observed that this

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6. In its opinion denying plaintiffs' motion to dissolve the three-judge court, the district court referred to the "elusive" and "subtle" distinction between "an attack on the constitutionality of a statute as applied and an attack on the result of application of a statute the constitutionality of which is not in question." Appendix B at p.3. With all due respect to the district court, that elusive and subtle distinction is not presented in the present case, and in any event, the distinction is no longer so elusive and subtle after Costello. An attack on the result of the application of a statute in the context of the statute's being interposed as a bar to equitable relief is not at all an attack on the constitutionality of the statute within the meaning of 28 U.S.C. §2281. Rather than being unconstitutional as applied, any such statute simply cannot be applied where its application would interfere with the implementation of a federal court remedial order. Costello v. Wainwright, 430 U.S. 325 (1977), makes it clear that a three-judge court is not required where a federal court's remedial order requires state officials to take action inconsistent with state law, which is all that plaintiffs have sought in the present case.

was one of those "unclear cases," and that the case should continue as a single-judge and three-judge district court case and that the "case shall be tried with the originating judge designated to receive the evidence." Appendix B at pp.5-6.

Again, the three-judge district court overstepped the bounds of law--for the "safest course" in a "close case" is not to convene a three-judge district court. As this Court has held, "a contrary view of this case would be inconsistent with our oft-repeated admonition that the three-judge court statute is to be strictly construed." Board of Regents v. New Left Education Project, 404 U.S. 541, 545 (1972). See also, Allen v. State Board of Elections, 393 U.S. 544 (1969); Phillips v. United States, 312 U.S. 246, 251 (1941). Not only is the now-repealed §2281 to be strictly construed, but 28 U.S.C. §1253 too must be narrowly construed in view of the "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court." Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974).

The district court erred as a matter of law in convening a three-judge district court pursuant to the now-repealed 28 U.S.C. §2281. Since this case was not "required" to be heard by a district court of three judges, this Court lacks jurisdiction under 28 U.S.C. §1253.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Plaintiffs, in their Amended and Substituted Complaint below, alleged a deprivation of their rights, privileges and immunities secured by the Constitution of the United States. Primary among the constitutional guarantees is Section 1 of the Fourteenth Amendment which states in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiffs also alleged violations of 42 U.S.C. §1983, which states in full:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

A statutory three-judge district court was convened below pursuant to the now-repealed 28 U.S.C. §2281, which provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

An appeal from a final order by a properly constituted three-judge district court may be taken directly to this Court pursuant to 28 U.S.C. §1253, which states:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

Defendants moved for the convening of a statutory three-judge district court below on the grounds that plaintiffs--now appellants--sought to enjoin the enforcement of various state laws and constitutional provisions which mandated segregation or arguably interfered with the equitable inter-district school desegregation relief sought by plaintiffs. Those state laws and constitutional provisions are set forth hereafter.

Georgia Constitution, Article VIII, Section I, Chapter 2-6401 (1945), which plaintiffs sought to enjoin insofar as it mandates segregation in the schools, provides:

> "The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation. Separate schools shall be provided for the white and colored races."

Georgia Code §32-847, and Georgia Code §32-848, which plaintiffs sought to enjoin insofar as they bar students and teachers from being reassigned on the basis of race in a desegregation remedy, respectively provide in relevant part:

> "No student shall be assigned to or compelled to attend any school on account of race, creed, color or National origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of students of one or more particular races, creeds, colors or National origins, and no school district or school system, by whatever name known, shall be established, reorganized or maintained for any such purpose."

> "No teacher shall be assigned to or compelled to teach at any school on account of race, creed, color, or National origin, or for the purpose of achieving a certain ratio at any school of teachers of one or more particular races, creeds, colors or National origins, and no school district or school system, by whatever name known, shall be established, reorganized or maintained for any such purpose."

Finally, Georgia Constitution, Article VIII, Section V,

Chapter 2-6801; Georgia Code §32-901; and Georgia Constitution, Article VIII, Section VII, Chapter 2-7001, which plaintiffs sought to enjoin insofar as they confine control and management of public schools to county boards of education and to municipal corporations and conflict with the interdistrict school desegregation remedy sought by plaintiffs, respectively provide in relevant part:

> "Each county, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a County Board of Education."

> "Each and every county shall compose one school district, and shall be confined to the control and management of a county board of education."

> "Authority is hereby granted to municipal corporations to maintain existing independent school systems, and support the same as authorized by special or general law, and such existing systems may add thereto colleges. No independent school system shall hereafter be established."

QUESTIONS PRESENTED

In the Jurisdiction section of this Jurisdictional Statement, plaintiffs--now appellants--have argued that this Court lacks jurisdiction to hear this appeal, and that their appeal thus should be dismissed for want of jurisdiction. The jurisdictional question is as follows:

> 1. Is a school desegregation case "required" to be heard by a three-judge district court pursuant to 28 U.S.C. §2281 where the only state laws whose constitutionality is drawn into question either are segregation and antidesegregation laws or are laws that affect only the interdistrict remedy sought by plaintiffs?

If this Court were to note probable jurisdiction, the issues on the merits are as follows:

2. Is it error for a district court to arbitrarily hold irrelevant all evidence of discriminatory actions taken prior to 1967 in an interdistrict school desegregation case filed in 1972 by plaintiffs who allege that the schools have been intentionally segregated in violation of the Fourteenth Amendment?

3. Is it error for a district court to dismiss an interdistrict school desegregation case on the merits where plaintiffs proved interdistrict violations in the manner prescribed by Milliken v. Bradley, 418 U.S. 717 (1974), and where the trial court concluded that "official acts of government officials at all levels contributed to the separation of the races in education" and "in housing"?

STATEMENT OF THE CASE

Not only in 1954, but continuing through to the mid-1960s, the schools in the six-county Atlanta metropolitan area[7] were segregated by law. See Appendix D at p.3. By 1972, the inner-city Atlanta school district--where the State earlier and for decades had maintained "the only black high school in

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7. Atlanta, the black core of the six-county metropolitan area, lies within two counties, Fulton County and Dekalb County. Altanta splits Fulton County in half with unincorporated north Fulton to the north of the City and unincorporated south Fulton to the south. Atlanta also extends east into southwestern Dekalb County.

In the six-county metropolitan area, Atlanta is surrounded by the following counties in a clockwise manner: north Fulton County to the north; Dekalb County and Gwinnette County to the east; Clayton County to the southeast; south Fulton County to the south; Douglas County to the southwest; and Cobb County to the west and northwest.

Atlanta and its school district are predominantly black. The surrounding counties and their school districts are overwhelmingly white.

the six county area, involved in this case," Appendix D at p.4--was nearly 90% black. The six surrounding county school districts were overwhelmingly white.

This interdistrict segregation between the black inner city of Atlanta and its white suburbs was not surprising in view of the overt segregation practiced by government officials from Plessy v. Ferguson, 163 U.S. 537 (1896), through the mid-1960s. The facts and causes of this interdistrict segregation--now a matter of court record and court findings --spurred the filing of this interdistrict school desegregation case in 1972. It was supported in part by three major premises.

First, interdistrict segregation in the six-county Atlanta area was caused by a system of interdistrict segregative transfers. As the district court later found, this interdistrict transfer system was in effect for nearly 60 years and "the transfer was used to preserve segregation in the schools." Appendix D at pp.3-4. Interdistrict segregation also was caused by such practices as placing and maintaining for decades in the heart of Atlanta the metropolitan area's only black high school. Id.

Second, official school segregation was known to have a substantial impact upon residential segregation As the district court ultimately found in this case: "The race of schools helped to designate the race of the land on which they were located and the neighborhood which they served, just as the race of the neighborhood determined the race of the schools until well after the 1954 decision in Brown v. Board of Education." Appendix D at p.13. Moreover, official school segregation, especially in Atlanta with its sizeable black population, lasted well after Brown. As late as "the 1961-1962 school year, when a few black students entered white schools in Atlanta, all schools in the state were

totally segregated." Appendix D at p.3. In fact, in some of the predominantly white suburban counties, official school segregated lasted even longer. "Until 1970 in [suburban] Fulton County and 1969 in [suburban] DeKalb County, attendance zones were separated into white or black zones." Appendix D at p.15. "It need not be reiterated that racial designation of the school in a given area tends to designate the race of the neighborhood." Id.

Third, interdistrict segregation in the six-county Atlanta metropolitan area was caused by more than just racial designation of schools. Based upon an "impressive amount of evidence," the court below found that plaintiffs' evidence "shows that separation of the races has existed in housing patterns in the Atlanta metropolitan area for the past 50 years," Appendix D at p.28,[8] and that this separation is not and never has been adventitious: "That this condition of racial separation was caused in part by the intentional acts of government officials has also been shown." Id.

In 1972, black parents whose children attended segregated schools in the nearly 90% black Atlanta school system filed this interdistrict school desegregation lawsuit. They alleged violations of the Fourteenth Amendment and of 42 U.S.C. §1983 by defendants Georgia State Board of Education and its duly appointed members, the Georgia Superintendent of Public Instruction, the Atlanta Board of Education, and six county and three small city boards of education in the Atlanta metropolitan area, and they sought an interdistrict school desegregation remedy involving the transfer of students between

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8. The district court added: "It is clear from the plaintiffs' evidence, and indeed would be obvious to anyone who is familiar with metropolitan Atlanta, that there are very few integrated neighborhoods in the Atlanta area." Appendix D at p.30. Indeed, "it is obvious to the most casual observer that integrated housing patterns do not prevail in the Atlanta metropolitan area." Id. at p.32.

various of the school districts in the Atlanta metropolitan area so as to eliminate the condition of interdistrict school segregation caused by the defendants in concert with other governmental entities.[9]

Although this case was filed prior to this Court's decision in Milliken v. Bradley [Milliken I], 418 U.S. 717 (1974), it proceeded into discovery and was tried to the district court on the liability issue after the Milliken I decision. Unlike Milliken I, where the suburban school districts were invited into the case only after the liability proceedings had concluded, the suburban districts here were brought into this case at the outset and were fully represented at the liability trial. In adducing proof at trial, plaintiffs here carefully followed the guidance provided by this Court in Milliken I. Plaintiffs' evidence--showing, e.g., severe interdistrict school and housing segregation, a history of intentional interdistrict school transfers to maintain segregation, and a history of intentional governmental actions causing the severe interdistrict residential segregation in metropolitan Atlanta--was eventually characterized by the district court as "truly staggering." Appendix C at p.14.

The district court's findings of fact represent only a small part of the truly staggering scope of plaintiffs' evidence. In its findings, the district court nonetheless listed part of the history of interdistrict transfers used to maintain the dual school system in metropolitan Atlanta:

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9. As is set forth in the Jurisdiction section of this Jurisdictional Statement, see pp. 2-9, supra, a three-judge district court was convened, over plaintiffs' objections, to hear this case. See Appendices A & B. That court directed that this case proceed as both a single-judge and three-judge court case, and that the evidence in this case be heard only by the single-judge court. Id.

--"From 1903 to 1964 students could cross system lines.... Systems sometimes contracted for the exchange of students in order that the receiving system might receive state funds for such students.... Historically, the transfer was used to preserve segregation in the schools." Appendix D at pp.3-4.

--"For many years Booker T. Washington High School [in Atlanta] was the only black high school in the six-county area involved in this case." Appendix D at p.4.

--"From 1940 to 1965-66 the State Board of Education paid State funds to Marietta for the transfer of from 41 to 274 black Cobb County high school students across system lines to the black high school in Marietta." Appendix D at pp.4-5.

--"Those black students who desired a high school education were forced to attend Booker T. Washington High School in Atlanta or a black high school in Marietta.... These are only two of the many examples of transfer of students across system lines in order to preserve a dual school system in Georgia." Appendix D at pp.4-5.

State funds, the district court found, were used to pay for these segregative transfers:

--"In many instances throughout the state the financial burdens of a dual school system necessitated the use of facilities in other school districts for black students. State funds were used to pay the receiving system, with local systems paying for the transportation of students who transferred and parents paying tuition for requested students." Appendix D at p.4.

The state did more than simply pay for segregation. It required segregation hand-in-glove with the ten school districts in metropolitan Atlanta. As the district court found:

--"Under the Constitution of Georgia, Ga.Code Ann. §2-6401, the state has primary responsibility for providing education for its citizens and separate schools for the races." Appendix D at p.2.

--"Government acts in the past tended to foster the building and maintenance of a dual school system." Appendix D at p.2.

Again, state monies were provided:

--"State funds for construction of schools were first made available under the Capital Outlay Program begun in 1950. Under this first Capital Outlay Program and a second capital outlay program in 1960, sites were selected and schools were planned on a segregated basis." Appendix D at p.3.

The results of these actions were devastatingly successful in creating and maintaining segregation:

--"Until the 1961-62 school year, when a few black students entered white schools in Atlanta, all schools in the state were totally segregated. Appendix D at p.3.

--"Until 1961 the public schools of Atlanta were completely segregated.... Some 47 schools designated by race were opened after 1954 by the City of Atlanta." Appendix D at p.13.

--"53 of the 55 City of Atlanta schools which were built or designated as black schools or converted from white to black prior to 1970 remain black today." Appendix D at p.9.

These specific findings, among others, led the district court to a conclusory finding of fact:

--"Historically, official acts of government officials at all levels contributed to the separation of the races in education." Appendix D at p.2.

The acts of these officials contributed not only to segregation in education but also to segregation in housing patterns. The relationship between segregated schools and segregated housing patterns, an interface usually assumed, here was reduced to findings of fact:

--"The race of schools helped to designate the race of the land on which they were located and the neighborhood which they served, just as the race of the neighborhood determined the race of the schools until well after the 1954 decision in Brown v. Board of Education." Appendix D at p.13.

--"It need not be reiterated that racial designation of the school in a given area tends to designate the race of the neighborhood." Appendix D at p.15.

--"It is also patently obvious that there is an interface between housing patterns and school populations." Appendix D at p.32.

In some instances, this interface was immediate and direct. As the district court found:

--"A City of Atlanta ordinance of 1931 prohibited a person of one race from moving into a housing unit last occupied by a person of another race if the housing unit was located within 15 blocks of a public school unless a permit was granted by the General Counsel of the Borough of Atlanta." Appendix D at p.10.

--"Prior to 1965 all [public] housing in the metropolitan area [83% of which was in the City of Atlanta] was segregated, black projects being built in the area of black residential areas or in areas designated by housing authorities as sites for future black residential expansion. Segregated schools were built adjacent to black projects." Appendix D at pp.15-16.

In other instances, the interface was less immediate but equally effective. For example, as the district court found,

the housing (old and planned) in western, southern and southeastern Atlanta was converted to all-black housing by official government actions continuing through the 1960s. It began with official racial zoning:

--"An ordinance of the City of Atlanta of 1924 designated certain areas of Atlanta for black occupancy (R-2) and certain areas for white occupancy (R-1)." Appendix D at p.10.

Thereafter, the concentration and conversion were accomplished through other government actions:

--"Officials of the City of Atlanta caused to be erected various barriers, boundaries and buffer zones between black and white areas." Appendix D at p.11.

Not all of these actions worked. Nonetheless, government officials were able to convert Atlanta into a predominantly black city through metropolitan planning and official blockbusting:

--"The Metropolitan Planning Commission, established in 1947, and the Westside Mutual Development Committee, established in 1952, played an important part in the determination of areas for black expansion. The purpose of the Metropolitan Planning Commission was to prepare a master plan for orderly growth and development of the metropolitan area. This included planning for Negro expansion. The purpose of the Westside Mutual Development Committee, on the other hand, was to facilitate conversion of designated residential areas from white to black. The Westside Mutual Development Committee acted with neighborhood groups in facilitating an orderly transition of neighborhoods." Appendix D at p.12.

--"During the 1950s the mayor [of Atlanta] appointed a number of bi-racial neighborhood committees to facilitate the transition of various areas suitable for the development of black subdivisions. The purpose of these bi-racial committees was to ease racial tensions in areas of new or transfer black housing." Appendix D at pp.12-13.

While government officials primarily in the 1940s, 1950s and 1960s converted western, southern, and southeastern Atlanta into an all-black residential area, government officials in the suburban areas outside of Atlanta eliminated or severely curtailed the growth of the black communities already existing in suburban areas. These actions had the reciprocal effect of concentrating the black population in Atlanta. As the district court concluded:

--"Historically, the official acts of local government units outside of the City of Atlanta discouraged movement of blacks into those areas and discouraged the continuation of black enclaves already located there." Appendix D at p.13.

Numerous specific findings backed up this conclusion. For example:

--"In some instances there have been active steps taken to discourage the presence of blacks. An example of this is the condemnation of the black homes in the Bagley Park area by Fulton County officials in 1947. The residential area condemned was replaced by a park designated for the use of whites only. Many of the dispossessed Negro families moved into already overcrowded housing in the City of Atlanta." Appendix D at p.14.

--"Although both the Urban League and the Metropolitan Planning Commission recommended in the late 1940s and early 1950s that the Lynwood Park Community in DeKalb County be extended for Negro expansion, this recommendation was not accepted. In fact, the closing of Mabry Road to the south, Osborne Road to the north, and a dirt road to the west cut off the black community located there." Appendix D at p.14.

--"The black community located in Chamblee in DeKalb County disappeared between 1950 and 1970." Appendix D at p.14.

--"In 1956 a black owner of ten acres on LaVista Road in DeKalb County attempted to obtain zoning approval to subdivide his land for black residential expansion. Because of white opposition the black owner withdrew his application." Appendix D at pp.14-15.

--"Urban renewal projects in Decatur, Georgia [in DeKalb County], in the early 1960s caused over 400 black families to be displaced. Relocation sites in north DeKalb County were not accepted, and the bulk of the displaced population moved into the Kirkwood area in east Atlanta or into the Scottdale area, a black enclave close to the urban renewal area. The end result of the relocation of families displaced by urban renewal in Decatur was an increase in the black population of the City of Atlanta and south DeKalb County. [The eastern part of the City of Atlanta lies within south DeKalb County.]" Appendix D at p.15.

The concentration of the black population in Atlanta and the preclusion of black residential development in the suburbs were accomplished not just by the foregoing official actions. Another series of official actions was the location of public housing. As the district court found:

--"Location of public housing has tended to concentrate the black population of the metropolitan area within the City of Atlanta." Appendix D at p.15.

It must be recalled that segregation in education and in housing, including of course public housing, was open, admitted and officially enforced through the mid-1960s:

--"Prior to 1965 all housing in the metropolitan area was segregated, black projects being built in the area of black residential areas or in areas designated by housing authorities as sites for future black residential expansion. Segregated schools were built adjacent to black projects." Appendix D at pp.15-16.

Most of the public housing in metropolitan Atlanta was built within the City of Atlanta:

--"There are 23 public housing authorities in the six-county Atlanta metropolitan area. As of 1975 the Atlanta Housing Authority had constructed and was managing a total of 15,336 units of public housing, with another 864 units under construction. This represented 83% of the public housing in the Atlanta metropolitan area." Appendix D at p.15.

The siting of this massive amount of public housing was used to designate and concentrate black residential areas:

--"Until 1964 all public housing units built by the Atlanta Housing Authority for blacks were placed in established communities or in areas earmarked for Negro expansion. When the projects began to be desegregated in the mid-1960s, blacks were guided only to those white projects south of the North Avenue-Ponce de Leon line. Four new housing projects which opened in 1968 and 1969, Perry Homes Extension, McDaniel-Glenn Apartments, Bankhead Courts, and Hollywood Courts, continued to concentrate the black population. Projects opened in the 1970s have tended to scatter public housing throughout the city. All of these projects, however, have either been located in southwest Atlanta or in transitional areas." Appendix D at p.18. [Note: "transitional" areas in Atlanta are integrated neighborhoods designated for conversion to black neighborhoods.]

On several occasions, the Atlanta Housing Authority sited a public housing project adjacent to but outside of the City of Atlanta in suburban Fulton County. The land on which such projects were sited, however, was always annexed by the City of Atlanta, thereby adding to the black residential and school population of Atlanta while maintaining the all-white character of the suburban counties:

--"The Atlanta Housing Authority was authorized by Ga. Code Ann. §99-1103(f) to build within ten miles beyond the Atlanta city limits into unincorporated Fulton County. Prior to 1971 the land on which the Atlanta Housing Authority planned black housing projects in unincorporated Fulton County was always annexed by the City of Atlanta before the project was opened. This sequence of events took place in regard to Carver Homes, Perry Homes [the largest public housing project in the metropolitan area], and Kimberly Road Homes." Appendix D at p.16.

On one occasion, in 1970, the Atlanta Housing Authority developed a site south of Atlanta deeper into south Fulton County. The responsive actions of Fulton County officials led to judicial findings of intentional and unlawful discrimination:

--"When the Atlanta Housing Authority in 1970 decided to build public housing in portions of unincorporated Fulton County that were not adjacent to Atlanta, Fulton County officials denied permits to two developers. This action was found to constitute unlawful racial discrimination in Crow v. Brown, 332 F.Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972). Pursuant to the court's order in Crow, a Joint Committee for the Selection of Public Housing Sites was created, and in a report issued in 1972 the Committee recommended numerous sites in unincorporated Fulton County for public housing. No public housing has been built on any of these sites.... Development of public housing in these sites was precluded by rezoning, denial of parking variances, etc." Appendix D at pp.16-18.

Overall, the actions of the suburban housing authorities added to the concentration of blacks within the City of Atlanta:

--"In addition to the Fulton County Housing Authority and the Atlanta Housing Authority, there are seven municipal housing authorities in Fulton County. According to plaintiffs' figures, there have been no housing units built by any of these housing authorities since 1970." Appendix D at p.17.

--"Each of the municipal housing authorities and the Fulton County Housing Authority mentioned above, with the exception of the Atlanta Housing Authority, has a residency preference for areas for applicants residing in their respective areas. Each has a waiting list with waiting periods of several months to three years." Appendix D at p.17.

--"In DeKalb County there are four housing authorities operating in that portion of DeKalb County which is not Atlanta. These are the DeKalb County Housing Authority, the Decatur Housing Authority, the Lithonia Housing Authority, and the Doraville Housing Authority, which is now inactive. According to plaintiffs' figures, the latest public housing built by any of these authorities was built in 1970. All three housing authorities have long waiting lists. All three have residence preferences for applicants residing in DeKalb County." Appendix D at pp.17-18.

--"As opposed to other housing authorities in the metropolitan area, the Atlanta Housing Authority has never had a residence requirement. As of 1974 there were more than 7,200 families on the Atlanta Housing Authority's waiting list, 91 to 92% of which were black." Appendix D at p.18.

Plaintiffs' evidence of segregated housing patterns in metropolitan Atlanta caused by government actions was equally as extensive as plaintiffs' evidence of segregated schooling in metropolitan Atlanta caused by government actions. As the district court concluded:

--"Historically, official acts of government officials at all levels contributed to the separation of the races in housing." Appendix D at p.10.

Despite plaintiffs' overwhelming evidence--illustrated by the foregoing findings of fact--of government contributions to interdistrict segregated schooling and interdistrict segregated housing in metropolitan Atlanta, the district court declined to find violations of the Fourteenth Amendment and

of 42 U.S.C. §1983. Instead, the district court dismissed plaintiffs' case in two phases.

After plaintiffs presented their case, seven of the suburban defendants moved to dismiss plaintiffs' case for failure to state a claim. The district court granted their motions on grounds different from those sought by defendants. Appendix C. First, the court held that "the past history of racial segregation is not relevant to a consideration of these defendants' motions to dismiss. The court finds it unnecessary to specifically consider documentary evidence relating to events occurring prior to 1967." Appendix C at p.16. Second, after applying its five-year relevancy test to plaintiffs' case filed in 1972, the court proceeded to find "no significant violations of recent vintage." Appendix C at p.26. In applying a five-year relevancy rule and in making its findings, the district court conceded that it was affected primarily by the interdistrict student transfer remedy sought by plaintiffs. Characterizing such relief as a "drastic remedy," the court held that "it is only realistic [at the liability stage] to measure the extent of violations alleged against the relief sought." Appendix C at p.27.

Despite the district court's dismissal of the outlying suburban defendants, the remaining defendants (the school boards in Atlanta, in Fulton County, and in DeKalb County, and the state defendants) chose not to file similar motions to dismiss. Instead, they proceeded to present their evidence against a finding of liability. Thereafter, plaintiffs presented a short rebuttal case. Then, the court dismissed plaintiffs' case against the remaining defendants. Appendix D. Although the court abandoned its five-year relevancy rule, it adopted similar reasoning.

First, the court disregarded plaintiffs' evidence and its own findings concerning the substantial use of segregative

interdistrict transfers to maintain the dual school system in metropolitan Atlanta, and instead concentrated on the 1979 intradistrict remedial status of the three remaining defendant school districts:

--"The court has found that the defendant school systems remaining in this case have either been declared unitary or are presently operating under final desegregation orders of this court. Once a system is declared unitary, it would stand to reason that the past history of segregation in that system would no longer be relevant to an inquiry into the existence of present-day constitutional violations. Furthermore, plainiffs have shown no intent to discriminate on the part of any school official of any defendant school system during the years since they were declared unitary or have been operating under court-ordered plans. The court, therefore, finds that there have been no constitutional violations by school officials of the defendant school systems which would justify the imposition of the interdistrict remedy sought by the plaintiffs." Appendix D at pp.26-27.

Second, the district court disregarded plaintiffs' evidence and its own findings concerning the responsibility of school officials for contributions to segregated housing patterns and the responsibility of government officials for creating segregated housing patterns in metropolitan Atlanta. Instead, the court chose to look blindly only at present-day 1979 government actions:

--"The plaintiffs have shown no evidence that present-day governmental discrimination plays any role in these segregated housing patterns. Governmental discrimination played a significant role in the past, but plaintiffs have not shown that any of them has sought and been denied any housing because of governmental discrimination." Appendix D at p.21.

Yet, the court conceded, as it had to, that the segregated housing patterns had been caused at least in part by intentional governmental actions:

--"Plaintiffs have amassed an impressive amount of evidence which shows that separation of the races has existed in housing patterns in the Atlanta metropolitan area for the past 50 years. That this condition of racial separation was caused in part by the intentional acts of governmental officials has also been shown." Appendix D at p.28.

Nonetheless, the court remained most influenced by the inter-district student transfer remedy sought by plaintiffs:

--"The court concludes that whatever effect past housing violations have had upon the schools is too attenuated to constitute the type violation which would justify imposition of an interdistrict remedy." Appendix D at p.32.

Orders dismissing plaintiffs' case were entered by the single-judge district court and by the three-judge district court on September 24, 1979. Appendix D. On that same date, a Final Judgment was entered by the Clerk. Id. An Amended Final Judgment was filed on October 29, 1979. Appendix G.

Plaintiffs filed Notices of Appeal to the U.S. Court of Appeals for the Fifth Circuit and to this Court from the initial Final Judgment on October 22, 1979. Appendices E & F. Amended Notices of Appeal were filed to both courts from the Amended Final Judgment on November 9, 1979. Appendices H & I.

Plaintiffs' appeal has been docketed in the Fifth Circuit. For the reasons stated in the Jurisdiction section at pp. 2-9, infra, plaintiffs believe that this Court is without jurisdiction to hear this appeal, and that the appeal in this case lies in the Fifth Circuit. On the merits, plaintiffs submit that the court below erred as a matter of law.

SUBSTANTIAL STATUTORY AND CONSTITUTIONAL QUESTIONS ARE PRESENTED

In Milliken v. Bradley, 418 U.S. 717 (1974), this Court was not presented with any findings or evidence of interdistrict violations, 418 U.S. at 745, nor with "any question concerning possible state housing violations," 418 U.S. at 728 n.7. On the record and findings before this Court there thus was "no constitutional wrong calling for an interdistrict remedy," 418 U.S. at 745.

On a different factual record, however, there can be a constitutional wrong calling for an interdistrict remedy. In Chief Justice Burger's majority opinion in Milliken I, the Court concluded that "an interdistrict remedy might be in order" where it can "be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." Id. Mr. Justice Stewart, in his concurring opinion, similarly observed that "an interdistrict remedy" would be "proper, or even necessary" where it is shown "for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, or by purposeful, racially discriminatory use of state housing or zoning laws." 418 U.S. at 755 (citations omitted) (emphasis added). Additionally, where it can be proven that an existing racial "disparity" between a city and its suburbs "was imposed, fostered, or encouraged by the State or its political subdivisions, it follows that [an] interdistrict violation was shown." 418 U.S. at 756 (footnote omitted) (emphasis added).

Here, the district court's findings of fact, amply supported by plaintiffs' proof of interdistrict violations, meet and indeed exceed the criteria necessary for an inter-

district violation as set forth in Milliken I.[9]

The district court's failure to follow the teachings of Milliken I and of other Supreme Court decisions--especially in view of the district court's own findings of fact--presents substantial statutory and constitutional questions. Additionally, the district court erred as a matter of law by holding that this case was required to be heard in part by a statutory three-judge district court.

I. A SCHOOL DESEGREGATION CASE IS NOT "REQUIRED" TO BE HEARD BY A THREE-JUDGE DISTRICT COURT PURSUANT TO 28 U.S.C. §2281 WHERE THE ONLY STATE LAWS WHOSE CONSTITUTIONALITY IS DRAWN INTO QUESTION EITHER ARE SEGREGATION OR ANTIDESEGREGATION LAWS OR ARE LAWS THAT AFFECT ONLY THE INTERDISTRICT REMEDY SOUGHT BY PLAINTIFFS

The "threshold question" in this case is whether this Court has jurisdiction under 28 U.S.C. §1253 on direct appeal from the decision of the three-judge district court "purportedly convened pursuant to [the now-repealed] 28 U.S.C. §2281." Moody v. Flowers, 387 U.S. 97, 99 (1967).

For the reasons set forth in the Jurisdiction section of this Jurisdictional Statement, see pp. 2-9, supra, this case was not "required" to have been heard by a three-judge court, and this Court accordingly is without jurisdiction to hear this appeal.

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9. The findings and proof here also far exceed that in the Louisville, Indianapolis and Wilmington cases where interdistrict liability was found. See, respectively, Newberg Area Council v. Board of Education, 510 F.2d 1358 (6th Cir. 1974), cert. denied, 421 U.S. 931 (1975); United States v. Board of Commissioners of Indianapolis, 541 F.2d 1211 (7th Cir. 1976), vacated, 429 U.S. 1068 (1977), on remand, 573 F.2d 400 (7th Cir. 1978), cert. denied, 439 U.S. 1068 (1978), Evans v. Buchanan, 393 F.Supp. 428 (D.Del. 1975), sum aff'd, 423 U.S. 973 (1975).

II. THE DISTRICT COURT ERRED BY ARBITRARILY HOLDING IRRELEVANT ALL EVIDENCE OF DISCRIMINATORY ACTIONS TAKEN PRIOR TO 1967 IN AN INTERDISTRICT SCHOOL DESEGREGATION CASE FILED IN 1972 BY PLAINTIFFS WHO ALLEGE THAT THE SCHOOLS HAVE BEEN INTENTIONALLY SEGREGATED IN VIOLATION OF THE FOURTEENTH AMENDMENT

In determining whether official actions of government officials were intentionally discriminatory and hence unconstitutional, one thing is certain: remoteness in time is irrelevant. As this Court declared in Keyes v. School District No. 1, 413 U.S. 189 (1973): "We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continue to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'" 413 U.S. at 210-211.

Despite this clear admonition, the district court below dismissed seven of the suburban school districts from this case first by holding irrelevant all evidence pertaining to discriminatory actions taken prior to 1967, and then by finding that there were no current constitutional violations. See Appendix C.

In its ruling below, the district court initially conceded that the "evidence which has been amassed in this case is truly staggering." Appendix C at p.14. The district court also conceded, in view of plaintiffs' evidence that overt discrimination had been openly practiced by government officials in metropolitan Atlanta through 1964, that: "No one contends, and indeed the court can take judicial notice of the fact that no one can contend, that a condition of racial segregation did not exist in the six-county Atlanta

area prior to Brown and for many years afterward." Id. Faced with plaintiffs' staggering evidence, the district court simply chose to find it irrelevant: "its relevance to plaintiffs' case is questionable." Id. More to the point: "the past history of racial segregation is not relevant to a consideration of these defendants' motions to dismiss. The court finds it unnecessary to specifically consider documentary evidence relating to events occurring prior to 1967." Appendix C at p.16. After arbitrarily applying a five-year relevancy test to this case filed in 1972, the court proceeded to find "no significant violations of recent vintage." Appendix C at 26. The suburban school districts were thus dismissed from the case without having to rebut plaintiffs' staggering proof of intentional constitutional violations.

The use of historical evidence to prove a constitutional violation has always been deemed by this Court to be not only relevant but often necessary. In Keyes v. School District No. 1, supra, defendants complained that plaintiffs' evidence showing discriminatory actions prior to 1954 was irrelevant. This Court flatly rejected defendants' argument and held plaintiffs' evidence relevant and useful to proving a current constitutional violation. In Dayton Board of Education v. Brinkman, ___ U.S. ___, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979), this Court affirmed a current constitutional violation based on evidence dating primarily from the 1930s and 1940s. Similarly, in Columbus Board of Education v. Penick, ___ U.S. ___, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979), this Court affirmed a current constitutional violation based on evidence from as far back as 1871.

In proving and determining a constitutional violation, there of course is no five-year relevancy rule. As this Court summarized in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977): "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266 (emphasis added). Part of this sensitive inquiry demands review of the "historical background...particularly if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267. And, in making the final determination about the constitutionality of official actions, "remoteness in time certainly does not make those actions any less 'intentional.'" Keyes v. School District No. 1, 413 U.S. 189, 211 (1973).

The court below of course conducted no sensitive inquiry into the evidence of intent. Instead, it held to be irrelevant and refused to consider all of plaintiffs' evidence about discriminatory official actions which occurred prior to five years before the filing of this case. The district court's ruling is unprecedented, contrary to all authority, and erroneous as a matter of law.

III. THE DISTRICT COURT ERRED IN DISMISSING THIS INTERDISTRICT SCHOOL DESEGREGATION CASE ON THE MERITS WHERE PLAINTIFFS PROVED INTERDISTRICT VIOLATIONS IN THE MANNER PRESCRIBED BY MILLIKEN V. BRADLEY, 418 U.S. 717 (1974), AND WHERE THE COURT CONCLUDED THAT "OFFICIAL ACTS OF GOVERNMENT OFFICIALS AT ALL LEVELS CONTRIBUTED TO THE SEPARATION OF THE RACES IN EDUCATION" AND "IN HOUSING."

In Milliken v. Bradley, 418 U.S. 717 (1974), Chief Justice Burger writing for the majority stated that before an interdistrict remedy can be imposed, "it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." 418 U.S. at 744-745. The Chief Justice continued:

> "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." 418 U.S. at 745.

In his separate concurring opinion in Milliken I, Justice Stewart added that an interdistrict remedy would "be proper, or even necessary" where it is shown "that state officials had contributed to the separation of the races by drawing or redrawing school district lines." 418 U.S. at 755. Justice Stewart further observed that an interdistrict remedy would be appropriate where the racial disparity between a city and its suburbs can be shown to have been "imposed, fostered or encouraged by the State or its political subdivisions." 418 U.S. at 756 (footnote omitted). As an example, Justice Stewart mentioned the "purposeful, racially discriminatory use of state housing or zoning laws." 418 U.S. at 755.

The district court below wholly disregarded these teachings from Milliken I. By viewing this case as an

intradistrict case rather than as an interdistrict one, the court below erroneously focused on the unitary or near-unitary status of several of the individual school districts. See Appendix D at pp.26-27. Additionally, the district court disregarded not only Milliken I but also the teaching of Keyes v. School District No. 1, 413 U.S. 189, 211 (1973), that remoteness in time is not a valid consideration in finding intentional discrimination. By focusing on present-day 1979 government actions, the court below erroneously gave no consideration to plaintiffs' "impressive amount of evidence" establishing the causes and enduring effects of interdistrict segregation. See Appendix D at p.28. In fact, by entering its Final Order and Opinion dismissing plaintiffs' case, the district court disregarded its own findings of fact, such as its conclusory findings that "official acts of government officials at all levels contributed to the separation of the races in education," Appendix D at p.2, and that "official acts of government officials at all levels contributed to the separation of the races in housing," Appendix D at p.10.

Illustrative of "a constitutional violation within one district that produce[d] a significant segregative effect in another district, Milliken v. Bradley, 418 U.S. at 744-745, was the use of interdistrict transfers by the ten school districts in metropolitan Atlanta, a practice encouraged and paid for by the state to maintain a dual school system. Appendix D at pp.3-5. Additionally, as the district court found, Booker T. Washington High School in Atlanta for generations "was the only black high school in the six-county area involved in this case." Appendix D at p.4. The intended effect of this practice was obvious. "Those black students who desired a high school education were forced to attend Booker T. Washington High School in Atlanta." Id. This is but one "of the many examples of transfer of students across

system lines in order to preserve a dual school system." Appendix D at pp.4-5. Moreover, since the "race of schools helped to designate the race of the land on which they were located and the neighborhood which they served," Appendix D at p.13,[10] it is hardly surprising that the suburbs became whiter while the black community in inner city Atlanta expanded around old Booker T. Washington High School.[11]

Illustrative of government officials "contribut[ing] to the separation of the races by drawing or redrawing school district lines," Milliken v. Bradley, 418 U.S. at 755, i.e., creating "district lines [that were] deliberately drawn on the basis of race," Milliken v. Bradley, 418 U.S. at 745, was the annexation by the City of Atlanta of undeveloped suburban

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10. In Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (1971), a metropolitan but not an interdistrict desegregation case, this Court observed that:

> "[P]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of innercity neighborhoods." 402 U.S. at 20-21.

This observation about the interface between schools and housing in a metropolitan area was repeated in Keyes v. School District No. 1, 413 U.S. 189 (1973), where this Court stated that racial designation of schools can have "a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area." 413 U.S. at 202.

Here, that interface is a matter not of speculation but of court findings. In metropolitan Atlanta, is is "patently obvious that there is an interface between housing patterns and school populations," Appendix D at p.32, and "that racial designation of the school in a given area tends to designate the race of the neighborhood," Appendix D at p.15. This overt racial designation of schools and of land and housing continued in metropolitan Atlanta "until well after the 1954 decision in Brown v. Board of Education." Appendix D at p. 15. In fact, overt designation and official segregation continued for at least another twenty years through to the mid-1960s. Appendix D at pp.3, 15-16.

11. The expansion of the black community in inner-city Atlanta was caused not only by racial designation of the schools. It was also caused--not just contributed to--by the racial planning, racial zoning, government blockbusting, segregated public housing, etc., carried out by government officials at all levels. See Appendix D at pp.2-5, 10-18, as summarized in the Statement of the Case at pp.19-25, supra.

land that had been designated for black housing projects and adjacent black schools. Appendix D at pp.16-17. Since the Atlanta school district's boundaries have been and are co-terminus with Atlanta's municipal boundaries, these deliberate annexation practices in the 1950s and 1960s kept the suburbs white while increasing the concentration and segregation of blacks in the Atlanta schools.

These of course are but a few examples from the district court findings showing that "racially discriminatory acts... have been a substantial cause of interdistrict segregation" in metropolitan Atlanta. Milliken v. Bradley, 418 U.S. at 745. Other findings, such as those showing that interdistrict segregation was "imposed, fostered or encouraged by the State or its political subdivisions," Milliken v. Bradley, 418 U.S. at 756, are summarized in the district court's opinion. Particularly relevant are those findings concerning the governmental role in interdistrict housing segregation.

First, government officials at all levels directed and concentrated the black population from metropolitan Atlanta into the City of Atlanta. This was accomplished in part during the 1950s and 1960s through government planning, Appendix D at p.12; through the use of barriers, boundaries, buffers and street name changes to direct black residential growth, id., at p.11; and through widespread government blockbusting (actually neighborhood busting) undertaken and encouraged by the Metropolitan Planning Commission, the Westside Mutual Development Committee, and the mayor of Atlanta, id., at pp.12-13.

Second, government officials at all levels discouraged black movement to the suburbs and contained or eliminated the small black enclaves already located there. This was accomplished by condemning black neighborhoods and turning them into white parks, Appendix D at p.14; by closing roads

to isolate suburban black communities, id. at p.14; and by undertaking suburban urban renewal and relocating blacks in the City of Atlanta, id. at p.15.

Finally, government officials at all levels used public housing to "concentrate the black population in the metropolitan area within the City of Atlanta," Appendix D at p.15, by building segregated public housing projects and locating 83% of all public housing units within the City of Atlanta, id. at pp.15-16; by maintaining suburban residence requirements for projects in the suburbs but no residence requirements for housing projects in Atlanta, id. at pp.17-18; and by precluding the construction of public housing in the suburbs through building permit denials and rezoning actions, id. at pp.16-18.

As the district court below observed, metropolitan Atlanta's unassailable "condition of racial separation was caused in part by the intentional acts of government officials." Id. at p.28. If this Court's decision in Milliken I means anything, then the district court's findings of fact necessitate a conclusion of law that extensive interdistrict violations had been committed.

Yet, the district court refused to hold that even a single constitutional violation had been committed. Its dismissal of this case is erroneous as a matter of law.

CONCLUSION

For the reasons stated herein, this Court should dismiss this appeal for want of jurisdiction since the convening of the three-judge court below was not "required" within the meaning of 28 U.S.C. §1253.

In the event that this Court does not dismiss this appeal for want of jurisdiction, this Court should note probable jurisdiction over this appeal.

Dated: February 19, 1980

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-6108

EMMA ARMOUR, *et al.*,

Appellants,

v.

JACK P. NIX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM BY THE ATLANTA BOARD OF EDUCATION

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Appellants,

v.

JACK P. NIX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

Appellee The Atlanta Board of Education, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment dated September 24, 1979 of the three-judge District Court dismissing the above action be affirmed on the grounds that the decision of the Court below is clearly correct and does not warrant further argument.

STATEMENT

The motions to affirm filed by the other Appellees in this case have fully set forth the facts and the statutes involved. Those matters need not be repeated herein.

DISCUSSION

The motions to affirm filed by the other Appellees in this case also set forth more than adequate legal bases upon which the decision of the trial court should be affirmed without further review by this Court. Rather than burdening the Court with a restatement of the legal arguments set forth in the motions to affirm of the other Appellees, the Atlanta Board of Education expressly adopts and incorporates herein by reference the motions to affirm and arguments of the other Appellees with the same force and effect as if set forth fully herein and repeated. However, the Atlanta Board of Education would like to take this opportunity to apprise the Court of certain facts and procedural history peculiar to it and on account of which the decision of the three-judge panel in this case should be affirmed.

The Atlanta Public School System was first created in 1869 and has throughout its history provided public education to persons residing within the City of Atlanta. As the city limits of Atlanta have expanded throughout that period, so too have the educational jurisdictional limits of the Atlanta Public School System such that at all times the educational jurisdiction of the Atlanta Public School System and the city limits of Atlanta have been coterminous.

In 1958, shortly following the decision of this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), litigation was begun against the Atlanta Board of Education for the purpose of desegregating the Atlanta Public School System. During the following twenty-year period, the Atlanta Public School System has been embroiled in litigation of one form or another—either its own intra-district case which ended in 1976 with the United States

Court of Appeals for the Fifth Circuit denying a Motion by the same Plaintiffs for a rehearing of its earlier decision declaring the Atlanta School District to be unitary and purged of all vestiges of the formerly state imposed dual system or this multi-district case. *See Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975), *rehearing denied*, 525 F.2d 1203 (1976).

During the period of these suits, the Atlanta Public School System has evolved from one with a pupil ratio of approximately 70% white and 30% black in 1958, to one which in 1974 (when the trial court in *Calhoun v. Cook* found the System to be unitary) was 15% white and 85% black, to its present state of 11% white and 89% black. From a peak enrollment of approximately 115,000 students, the System has gradually lost student enrollment bringing it to its present enrollment of approximately 75,000 students. The administration and staff have experienced a similar racial inversion from predominately white to a ratio of approximately 75% black and 25% white. A majority black school board chaired by Dr. Benjamin E. Mays, a respected black educator and civil rights leader, now oversees the operations of the Atlanta Public School System.

The history of the school desegregation litigation within the Atlanta Public School System becomes significant when one recognizes that the Atlanta Public School System, the city system in which Plaintiffs were alleged to reside and whose schools their children were alleged to attend in their original Complaint, was on May 1, 1974 "for the fourth time in as many years" held by the District Court to be unitary, to wit: "The Court concludes that the Atlanta School District is unitary and has purged itself of all vestiges of the formerly state im-

posed dual system." The District Court's determination was affirmed by the United States Court of Appeals for the Fifth Circuit which similarly concluded that the City of Atlanta School System "is free of racial discrimination and it wears no proscribed badge of the past." *See Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975), *rehearing denied*, 525 F.2d 1203 (1976).

This Court held in *Milliken v. Bradley*, 418 U.S. 717 (1974) that the constitutional right of the Plaintiffs in this litigation is to attend a unitary school system in the district in which they reside; i.e., Atlanta. *Id.* at 746. Since the Plaintiffs in this case are being afforded their constitutional right to attend a unitary school system in the school district in which they reside, their claims for relief must necessarily fail. Hence, this one critical fact distinguishes the instant case from all the other "metro" cases to have reached this Court in which an interdistrict remedy was ordered. In all of those cases, the core urban school district within which the Plaintiffs resided had been judicially found to be non-unitary and racially discriminatory—thereby depriving the Plaintiffs of the "equal rights" secured to them under the Fourteenth Amendment and this Court's decision in *Brown v. Board of Education, supra. See Milliken v. Bradley*, 418 U.S. 717, 725-26 (1974) (*relief denied*); *Bradley v. School Board of City of Richmond, Virginia*, 338 F.Supp. 67, 72 (E.D. Va. 1972), *rev'd* 462 F.2d 1058, 1061 (4th Cir. 1972), *aff'd by equally divided court*, 412 U.S. 92 (1973) (*relief denied*); *Evans v. Buchanan*, 393 F.Supp. 428, 430 (D. Del. 1975), *aff'd* 423 U.S. 963 (1975) (*relief granted*); *Newburg Area Council, Inc. v. Board of Education*, 510 F.2d 1358, 1359 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975) (*relief granted*).

As mentioned earlier herein, the City of Atlanta School System has been judicially declared to be unitary and purged of all vestiges of past discrimination. Furthermore, Plaintiffs at trial offered no evidence that any of the other ten Defendant county and city school systems was operating in a non-unitary or racially discriminatory manner. There is, in other words, no evidence that any Plaintiff is attending school in a school system which is not unitary and free of racial discrimination.

For this reason alone, Appellees were entitled to Judgment in their favor and the decision of the trial court should be affirmed. Since Appellants have neither alleged nor proven that there has been any change within the Atlanta Public School System since it was declared to be unitary so as to render it a dual school system today, Appellants have shown no constitutional violation within the Atlanta Public School System so as to entitle them to any relief whatsoever under the prior decisions of this Court. Therefore, the decisions which Plaintiffs attempt to raise in this appeal are so unsubstantial as not to need further argument and the decision of the trial court should be affirmed.

The Atlanta Board of Education has been embroiled in desegreation litigation for over twenty years now. As expressed by Dr. Benjamin E. Mays, its President, in testifying upon the trial of this case, the Atlanta Public School System has within its own jurisdiction the resources, both financial and otherwise, to provide and it is in fact providing its citizens with a quality education. This Court has never held nor can the Atlanta Board of Education accept the proposition that a majority black school system cannot constitutionally be allowed to exist. In fact, to accept Plaintiffs' central notion that quality

education cannot be provided within a majority black school system even where the system has one of the highest per-pupil expenditures within the state and which is administered by black school officials subject to predominately black electoral control in a majority black city is to acknowledge certain inferiorities of the black race itself. It is this very concept (i.e., that even under such favorable circumstances a black child cannot learn unless he sits next to a white child in school) with which Dr. Benjamin E. Mays vehemently disagreed in his testimony at trial, which the trial court rejected in dismissing Appellants' Complaint in this action, and which Appellees ask this Court to expressly reject.

Since Appellants have shown no constitutional violation by the Atlanta Board of Education or any of the other Appellees in this case, the decision of the trial court in this case was correct and should be affirmed. The Atlanta Board of Education respectfully prays that this Court affirm the decision of the trial court in this case and allow it to devote its full time and attention to its task of providing quality educational services to its citizens.

CONCLUSION

For the reasons stated herein, this appeal should be affirmed without the need for further briefing on the merits or oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This ____ day of _____, 1980.

_____

Supreme Court, U.S.
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APR 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-6108

EMMA ARMOUR, *et al.*,

Appellants,

v.

JACK P. NIX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM BY SCHOOL SYSTEMS OF CLAYTON COUNTY, COBB COUNTY, DOUGLAS COUNTY, GWINNETT COUNTY AND THE CITY OF MARIETTA

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IN THE

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MOTION TO AFFIRM

Appellees, boards of education from the counties of Clayton, Cobb, Douglas, and Gwinnett and the City of Marietta, Georgia, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court, dated September 24, 1979, as amended on October 29, 1979, be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This civil action was brought in 1972 as a class action by black residents of the City of Atlanta whose children attended City of Atlanta public schools and who claimed to desire interdistrict transfer of school children from outlying county and city school systems to the urban school system of the City of Atlanta. Defendants are six county boards of education, four city boards of education, and the State Board of Education. The counties involved are Clayton, Douglas, Fulton, DeKalb, Gwinnett and Cobb. The Defendant cities are Atlanta, located in Fulton and DeKalb Counties; Decatur, which is located in DeKalb County; Buford, located in Gwinnett County; and Marietta, located in Cobb County.

Looking at the area covered by the six counties on a map, one finds that, as the crow flies, it is 70 miles from southwest to northeast and approximately 50 miles in every other direction. Much of the area is densely populated and heavily congested with traffic. The area covered by the six counties involved in this suit is 1,925 square miles. This is an area which is approximately equal to the entire State of Delaware or the entire State of Rhode Island. As of the 1970 census, the combined population was 1,418,823. [3/2/78 Order, p.1][1]

The school systems submitting this brief are on the periphery of the Atlanta area. They are the school systems of Clayton County, Cobb County, Douglas County, Gwinnett County, and the City of Marietta (hereinafter referred to as "the outlying systems").

---

[1] Findings by the district court shall be referenced herein in brackets, noting the date of the Orders—either interlocutory or final—and the page number.

The outlying systems were, pursuant to Fed. R. Civ. P. 41(b), dismissed from the case at the end of Plaintiffs' presentation of evidence because a battery of lawyers and others working on Plaintiffs' behalf for more than five years had simply failed to build a factual record that would allow, much less require, the district court to make the various specific factual determinations that, in light of *Milliken v. Bradley*, 418 U.S. 717 (1974) (hereinafter "*Milliken I*"), would be necessary to justify the extreme remedy of interdistrict relief. Although this was a proper three-judge district case,[2] the controversy on appeal is not truly jurisprudential or constitutional in nature—the controlling legal concepts are essentially undisputed. This appeal raises simply an insubstantial issue involving the weight of the evidence.

QUESTION PRESENTED

Whether or not the evidence submitted by Plaintiffs required a finding that any of the outlying systems involved, or any governmental bodies in metropolitan Atlanta, were guilty of conduct that has a present, significant, identifiable and quantifiable, segregative impact on any other school system.

ARGUMENT

Milliken I is, of course, the root case for the concept of interdistrict relief. It is recognized in that case that federal courts have the limited power to cross school district lines for desegregation purposes if circumstances warrant such a drastic remedy.

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[2] The argument presented in the motion to affirm or dismiss by Appellee State of Georgia is adopted herein by reference.

There are two constitutionally-borne competing interests recognized in *Milliken I* regarding the interdistrict remedy. One interest is, of course, to eliminate state mandated or deliberately maintained dual school systems. The trial court here found that all of the defendant school systems were unitary. The other interest is that of "local control over the educational process [which] affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs and encourages 'experimentation, innovation, and a healty competition for educational exellence.' " *Milliken I*, 418 U.S. at 741. This interest is significant in this case due to the autonomy of the local school systems and their close relationships with their respective county and municipal governments.

In the balancing of these interests in the context of the interdistrict remedy, this Court stated:

> The controlling principal consistently expounded in our holdings is that the scope of the remedy is determined by the nature and the extent of the constitutional violation . . . [citation omitted]. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a crossdistrict remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. *Milliken I*, 418 U.S. at 744-745.

The interdistrict relief sought in this case would involve the massive transfer of thousands of children over hundreds of miles of heavily congested urban streets and interstate highways on a daily basis, and would also entail the dismantling and total restructuring of six local and autonomous county and city governmental bodies. The

scope of the remedy envisioned by Plaintiffs in this case could have been justified only by the most extreme showing of constitutional violations. And, yet, in this case, each and every school system involved, including the core system of the City of Atlanta, was found by the trial court, based on the Plaintiffs' evidence,[3] to be unitary or under an operating desegregation plan under the jurisdiction of the court prior to the commencement of this litigation. [3/2/28 Order, p.16; 9/24/79 Order, p.6]

The lower court specifically found at the close of Plaintiffs' evidence that there was no showing of "significant constitutional violations by *any* governmental body of the . . . [outlying counties and cities]." (Emphasis of the court.) [3/2/78 Order, p.25] It was also found that the Plaintiffs failed to present evidence of substantial constitutional violations with interdistrict impact. [3/2/78 Order, p.27]

The lower court noted specifically that the outlying systems were unitary at the time the suit was filed and held that "as long as the present existence or absence of constitutional violations is not ambiguous, the past history of racial segregation is not relevant to a consideration of . . . [the outlying counties'] motions to dismiss." [3/2/78 Order, p.16] This Court has held again and again that once a school system has achieved unitary status, without a showing that governmental bodies have deliberately attempted to manipulate demographic patterns to

[3] In the Jurisdictional Statement, Plaintiffs refer time and again to the trial court's comment on Page 14 in the March 2, 1978 Order that, "The evidence which has been amassed is truly staggering." It was the quantity, not the quality or credibility, of the evidence about which the court spoke, referring to over 1,000 multipage documents, most of which pre-dated the very existence of what is now a "metropolitanized" area surrounding Atlanta.

affect the racial composition of the schools, further intervention by federal courts should be unnecessary. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

There are several other significant findings by the trial court. First, insofar as Plaintiffs' housing theory is concerned, the court, recognizing that segregated housing patterns do exist in the City of Atlanta, found that the phenomenon exists today, not because of governmental actions, but because of personal preference, economic restraints, or reasons that can never be fully explained. [9/24/79 Order, p.19] The court further found that public education in Georgia is uniquely an integral part of local self-government. [9/24/79 Order, p.5] The educational system has been historically organized on a county basis with only a few independently-operated city school systems.

Perhaps one of the most significant findings of the trial court was that the urban school system of the City of Atlanta, where Plaintiffs' children once attended, has been declared by the courts to be unitary.[4] [9/24/79 Order, p.6]

In *Milliken I*, it was held that:

> Specifically it must be shown that racially discriminatory acts of the state or local school districts or of a single school district have been a substantial cause of interdistrict segregation. Thus, an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts

[4] Although the district court's adjudication of the Atlanta school case was unreported, it is a part of the record in this case and was affirmed by the United States Court of Appeals for the Fifth Circuit in *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975).

> caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. *Milliken I*, 418 U.S. at 745.

In *Milliken I*, it was found by the trial court, and, upheld by this Court, that there was evidence of *de jure* segregated conditions in the Detroit schools. There was no showing in that case, however, of any significant violation by the outlying schools and no evidence of any interdistrict violation or effect. Therefore, the interdistrict relief was denied. Here, not only were the outlying counties and cities found to be operating unitary school systems, but also the system of the City of Atlanta, whose racial composition Plaintiffs desire to alter by interdistrict transfers, was declared to be unitary. The facts in this case are further removed from *Milliken I's* interdistrict remedy requisites than the facts were in *Milliken I* itself.

The trial court here expressly found that "Plaintiffs have failed to show any constitutional violation by the State of Georgia or any of its subdivisions, including defendant school boards, which has had an interdistrict effect, so that the court would be justified in imposing an interdistrict remedy." [9/24/79 Order, p.33]

The only thing that Plaintiffs have been able to show in this case is that the unitary schools of some of the outlying systems have different racial compositions from their urban counterpart, the unitary system of the City of Atlanta.

As Mr. Justice Stewart observed, concurring in *Milliken I:*

> . . . Indeed, no evidence at all concerning the administration of schools outside the City of Detroit was presented other than the fact that these schools contained a higher proportion of white pupils than did the schools within the city. *Since the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause in the absence of a showing that such disparity was imposed, fostered, or encouraged by the State or its political subdivisions, it follows that no interdistrict violation was shown in this case.* 418 U.S. at 755-756 (Emphasis added).

The trial court was eminently correct in its ruling. In fact, Plaintiffs have not made any attack on the factual findings. Plaintiffs' appeal is aimed only at the trial court's application of the *Milliken I* standard to the facts of this case.

Plaintiffs' quarrel seems to be the lower court's unwillingness to pin liability on conduct so remote in time that it has no bearing on the current state of affairs in the City of Atlanta. The flaw in Plaintiffs' historical proof was that it did not show a present violation warranting interdistrict relief. The court expressly recognized [3/2/78 Order, p.15] the admonition in *Keyes v. School District No. 1,* 413 U.S. 189, 210-211 (1973) wherein this Court stated:

> We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make any of those actions any less "intentional." (Emphasis added).

Based on that admonition, the court considered the evidence and simply found against the Plaintiffs. Historical conduct alone is not enough to warrant the remedy sought by Plaintiffs in this case. The conduct must result in a present segregative condition. As noted above, and reemphasized here, the trial court correctly observed that once a school system has achieved unitary status, "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31-32 (1971). *See also, Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

The trial court correctly followed the holdings of this Court relating to school desegregation cases. *Milliken I* and its progeny were scrupulously adhered to. The trial court considered the evidence and the elements necessary for the findings of an interdistrict violation, including drawing or re-drawing of school district lines, transfer of school units between school systems, purposeful discriminatory use of state housing or zoning laws, and other considerations. The district court simply found that none of the requisite elements were present to justify federal interference with the autonomy of the local school systems in Georgia.

CONCLUSION

For the reasons stated above, we respectfully submit that the appellants present no substantial question for decision by this Court, and that the judgment and decree of the District Court should be affirmed.

Dated: April 21, 1980

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing MOTION TO AFFIRM BY SCHOOL SYSTEMS OF CLAYTON COUNTY, COBB COUNTY, DOUGLAS COUNTY, GWINNETT COUNTY AND THE CITY OF MARIETTA on counsel for Appellants by depositing same in the United States mail, with sufficient postage affixed thereto to insure delivery.

This ____ day of _____, 1980.

_____
Attorney at Law

Supreme Court, U.S.
FILED
APR 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM BY CITY OF DECATUR BOARD OF EDUCATION

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IN THE

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

Appellee City of Decatur Board of Education, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment dated September 24, 1979, of the three-judge district court dismissing the above action be affirmed on the grounds that the decision of the court below is clearly correct and does not need further argument.

STATEMENT

1. Introduction.

This is a direct appeal from the final judgment and decree entered on September 24, 1979, by a district court of three judges specially constituted pursuant to 28 U.S.C. § 2281 (the "district court") dismissing Appellants' complaint.

The State Board, Atlanta Board, DeKalb Board and Fulton Board and other Appellee Boards have also filed Motions to Affirm, and we refer the Court to those Motions and accompanying briefs for an overview of the entire case. This brief will focus primarily on the district court's dismissal of the case against the City of Decatur school system.

2. Proceedings Below.

Plaintiffs filed their original complaint on June 7, 1972, naming as defendants the State Superintendent of Schools and State Board of Education of the State of Georgia, as well as Fulton, DeKalb, Cobb, Clayton and Gwinnett Counties and the Cities of Atlanta, Decatur, Marietta and Buford. Douglas County was subsequently added as a defendant in this action. An Amended and Substituted Complaint was filed on September 30, 1975, in which Appellants attempted to mold their complaint around the language of this Court in *Milliken v. Bradley*, 418 U.S. 717 (1974).

After a bifurcated trial of the liability portion of this case, the City of Decatur school system, along with the school systems of Clayton County, Cobb County, Douglas County, Gwinnett County and the City of Marietta, were dismissed from the case, after the presentation of

Appellants' evidence, by order of the district court dated March 2, 1978. In its order, the three-judge district court concluded that Appellants had failed to make out a *prima facie* case against the City of Decatur and the six other moving defendants because of the failure of Appellants to show evidence of substantial constitutional violations having an interdistrict impact.

3. **Facts Relevant to Issues Presented.**

A. **The Parties.**

(1) **Appellants.** Appellants are black parents with school age children attending schools in the City of Atlanta school system. None of Appellants reside in the City of Decatur or have children attending school in the City of Decatur school system.

(2) **City of Decatur Board.** The City of Decatur school system, located within DeKalb County, Georgia, had an enrollment for the 1977-1978 school year of 3,051, with a racial composition of 75% black and 25% white (Decatur's Answers to Plaintiff's First Interrogatories, as supplemented on October 19, 1977). The school system operates seven elementary schools, one middle school and one high school, such that all students within the City of Decatur school system attend schools without regard to their race.

The school district lines for the school system are and always have been coterminous with the boundaries of the City of Decatur. Georgia Acts of 1889, Page 292. Although there have been a number of annexations by the City of Decatur, with concomitant changes in the district lines for the Decatur City school system, these changes all occurred over thirty years ago and were for non-racially motivated purposes (City of Decatur Motion for Sum-

mary Judgment, Affidavit of Robert Hudgins, paragraphs 2 to 17).

B. **School Evidence.**

The district court found that "[T]he Decatur Board of education is presently operating its school system under court order in *United States v. State of Georgia*, Civil Action No. 12972 (N.D. Ga., filed August 1, 1979)." March 2, 1978 Order, p. 26.

C. **Housing Evidence.**

The three-judge district court specifically found that there was no showing of "significant constitutional violations by *any* governmental body of the . . . [outlying counties and cities]." March 2, 1978 Order, page 25 (Emphasis added by court). In addition, the three-judge district court found that Appellants had failed to present evidence of substantial constitutional violations with interdistrict impact. March 2, 1978 Order, page 27.

ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION OVER THIS DIRECT APPEAL FROM THE JUDGMENT OF A THREE-JUDGE DISTRICT COURT.

This issue is fully briefed in the Motion to Affirm and Brief filed by Appellee State Board. We incorporate the State Board's Brief, and refer the Court to it for a full discussion of the facts and authorities relevant to this issue.

II. THE DECISION AND JUDGMENT OF THE THREE-JUDGE DISTRICT COURT IS CLEARLY CORRECT, AND SHOULD BE AFFIRMED WITHOUT FURTHER ARGUMENT.

In dismissing this action, the district court concluded:

> "Plaintiffs have failed to show any constitutional violation by the State of Georgia or any of its subdivisions, including defendant School Boards, which has had an interdistrict effect, so that the court would be justified in opposing an interdistrict remedy." September 24, 1979 Order, p. 33.

The district court's dismissal of this action as to all defendants is clearly correct in that Appellants have failed to show that there have been violations of their constitutionally protected rights in the sense of their right to attend racially balanced schools, and, assuming that such a right might exist, Appellants have failed to show any substantial constitutional violations of an interdistrict nature under *Milliken*. These issues and the authorities in this area have been extensively considered in the Motions to Affirm and supporting briefs filed by the State Board of Education, the Fulton and DeKalb County Boards of Education and by the Boards of Education of the City of Marietta, Clayton County, Cobb County, Douglas County and Gwinnett County. The City of Decatur Board incorporates those three briefs and asks that the Court consider their discussion of the facts and authorities on the issues herein.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Order and Judgment of the district court dismissing this action was clearly correct, and should be affirmed without further briefing on the merits or oral argument.

Respectfully submitted this _____ day of _____, 1980.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-6108

EMMA ARMOUR, *et al.*,

Appellants,

v.

JACK P. NIX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM BY FULTON AND DEKALB COUNTY BOARDS OF EDUCATION

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MOTION TO AFFIRM

Appellees Fulton County Board of Education ("Fulton Board") and DeKalb County Board of Education ("DeKalb Board"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment dated September 24, 1979, of the three-judge District Court dismissing the above action be affirmed on the grounds that the decision of the court below is clearly correct and does not need further argument.

STATEMENT

1. Introduction.

This is a direct appeal from the final judgment and decree entered on September 24, 1979, by a district court of three judges specially constituted pursuant to 28 U.S.C. § 2281 (the "district court") dismissing Appellants' complaint. Appellants brought this lawsuit in 1972 against the Georgia State Board of Education and six county and four city boards of education seeking a court order consolidating the school systems in the six-county Atlanta metropolitan area into one "superdistrict" covering approximately 1,925 square miles and containing over 300,000 students. In 1975, Appellants amended their complaint to delete their demand for consolidation, and substituted a demand for relief which, in effect, would accomplish a similar result by assigning students to schools over a six-county area without regard to county, city or school district boundary lines.

Relying on *Milliken v. Bradley*, 418 U.S. 717 (1974), Appellants contend that government officials have committed constitutional violations of an interdistrict nature which have caused a substantial disparity between the racial composition of Atlanta and the other Appellee school districts in this case. Appellants contend that these alleged violations justify the imposition of a metropolitan-wide school remedy without regard to existing county, city or school district lines. Appellants' primary contention is that government action in the distant past, from the 1920's to the mid-1950's, caused segregated housing patterns in the Atlanta metropolitan area which in turn led to the current racial imbalances in the schools. However, in 1958 the racial composition of the Atlanta school system was almost exactly the same as the racial com-

position of the Fulton and DeKalb County school systems today, approximately 30% black. Today, the Atlanta School System is approximately 89% black. Consequently, the racial imbalance which Appellants complain of occurred primarily during the 1960's and 1970's when even Appellants acknowledge that any governmental discrimination had for the most part ceased.

Appellees contend that neither Appellants nor their children have suffered any constitutional deprivation because they not only attend school in a unitary system, *i.e.*, Atlanta, but in the wealthiest school system in the State of Georgia. Therefore, there is no need for even an intradistrict remedy, much less the massive metropolitan remedy which the Appellants seek. Since this Court has made it clear that there is no requirement that schools be racially balanced, Appellees contend that the dismissal of this action was clearly correct.

Besides not showing that any of their constitutional rights have been violated, Appellants have not shown any violations having the requisite interdistrict impact under the holding of *Milliken, supra.* The district court found that the discriminatory acts shown by Appellants were either of a *de minimis* nature, or were purely intradistrict in impact (most of them took place in the City of Atlanta), or happened so long ago that whatever original impact they may have had no longer persists.

The other Appellee Boards of Education have also filed Motions to Affirm, and we refer the Court to those Motions and accompanying briefs for an overview of the entire case. This brief will focus primarily on the district court's dismissal of the case against the Fulton and DeKalb County school systems.

2. **Proceedings Below.**

After completion of discovery, the liability phase of this case was tried before the district court in late 1977 and early 1978. Following the presentation of Appellants' evidence, seven of the Appellee school boards filed Motions to Dismiss. By order dated March 2, 1978, the district court granted these Motions and dismissed the action against these seven school boards.[1]

Appellees Fulton Board, DeKalb Board, City of Atlanta Board of Education and State Board of Education of Georgia elected not to file Motions to Dismiss, and presented their evidence before the district court in March, 1978. Following final arguments, the district court, by Order and Judgment dated September 24, 1979 ("the September Order"), also dismissed the action against the Fulton, Atlanta, DeKalb and State Boards, and entered Findings of Fact and Conclusions of Law.

On October 22, 1979, Appellants filed their Notice of Appeal in the United States Supreme Court and simultaneously filed a "protective" Notice of Appeal in the United States Court of Appeals for the Fifth Circuit in the event it was subsequently decided this case should have been tried by a single district court judge rather than a three-judge court. Following several unsuccessful attempts by the Appellants to have the appeal heard in the first instance by the Fifth Circuit Court of Appeals, the Fifth Circuit stayed all proceedings before it pending a decision by this Court.

---

[1] Cobb County, Gwinnett County, Douglas County and Clayton County Boards of Education, and the Boards of Education of the Cities of Marietta, Decatur and Buford. Appellants have appealed the dismissal of the case against all of these school boards, except for the City of Buford.

On February 19, 1980, Appellants filed their Jurisdictional Statement in this Court, taking the unusual position that this Court *does not* have jurisdiction over their appeal. Appellees, on the other hand, contend that this Court does have jurisdiction over this appeal, and should affirm the Judgment of the district court on the grounds that it is clearly correct and there is no need for further argument.

3. Facts Relevant to Issues Presented.

A. The Parties.

(1) **Appellants.** Appellants are black parents with school age children attending schools in the City of Atlanta school system. None of Appellants have children attending school in the Fulton County or DeKalb County school systems.

(2) **Fulton Board.** Appellee Fulton Board is the public body within Fulton County responsible for the elementary and secondary education of all children living within the County but outside the City of Atlanta.

As of the beginning of the 1977-1978 school year, the Fulton County school system had 35,664 students attending its 77 schools, of which approximately 7,681 (21.53%) of the students were black and 27,983 (78.47%) were white. *See* 1977 Annual Report to Court in *Hightower v. West*, Civil Action No. 12,880, U. S. District Court for the Northern District of Georgia (April 19, 1970). As of the beginning of the 1979-80 school year, approximately 29% of the students of the school system were black. *See* 1979 Annual Report to Court in *Hightower v. West, supra.* By comparison, the percentage of black students in the public schools of the six-county metropolitan area in 1977 was approximately 32%.

The Fulton County school system lies wholly within

Fulton County. As of 1977, Fulton County, not including the City of Atlanta, had a population of 194,100, of which there were 26,100 black residents (13%) and 168,000 white residents (87%). Defendants' Exhibit Expert 17. During the 1970's, the black population of Fulton County outside Atlanta increased by over 100%, from 12,696 in 1970 to 26,100 in 1977. Defendants' Exhibit Expert 17.

Except for the City of Atlanta, the Fulton County school system boundaries coincide with the Fulton County boundary lines. The only changes in the school district boundary lines have been the result of several annexations of territory by the City of Atlanta. None of these boundary line changes were segregative in either purpose or effect, as found by the district court. September Order, p. 7.

(3) **DeKalb Board.** The DeKalb County Board of Education is the political body responsible for the education of children within the boundaries of DeKalb County, except for those children within the County attending the school systems of the Cities of Atlanta or Decatur. The DeKalb County school system, the second largest in the State of Georgia, had an enrollment for the 1977-1978 school year, the year of the trial of this case, of 85,951 students, of which 20,849 were black (24.25%) and 65,102 were white (75.25%). DeKalb County Answers to Plaintiffs' Interrogatories.[2]

DeKalb County is one of the largest counties in the State of Georgia. In 1977, its population was 427,800, of which 53,300 or 12% were black residents. Defendants' Exhibit Expert 13. The school district lines, with an area

[2] Although not a part of the record in this matter, it is interesting to note that the DeKalb school system was 25.45 percent black for the 1978-1979 school year and 28.88 percent black for the 1979-1980 school year.

of some 257 square miles, are coterminous with those of DeKalb County, except for the Cities of Atlanta and Decatur which have their own school systems. The only change in the school district lines, or for that matter, the boundary lines of DeKalb County, occurred in 1969, and involved a *de minimus* number of students. Hinson dep., p. 26. On the issue of boundary line changes, the district court expressly found that there had been no boundary line changes in either the DeKalb or Fulton County school systems for racially discriminatory purposes. September Order, p. 7.

During the decade of the 1970's, the DeKalb school system experienced a significant growth in its black population, as is graphically depicted by Defendants' Exhibit Expert 25 which reflects dramatic increases in the black population of the DeKalb County schools from the 1969-1970 school year to the 1977-1978 school year.

B. **School Evidence.**

The district court found that "The defendant school systems remaining in this case [Fulton, DeKalb and Atlanta] are either unitary or are operating under a court-imposed desegregation plan." September Order, p. 6. The district court made the following findings of fact as to each school system:

> 1. **Atlanta.** "The City of Atlanta school system was held by this court to be unitary on May 1, 1974, 'for the fourth time in as many years.' This court's adjudication of the Atlanta school case was affirmed by the United States Court of Appeals for the Fifth Circuit in *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975)." September Order, p. 6.
>
> 2. **DeKalb.** "DeKalb County desegregated its schools pursuant to this court's order of June 12,

1969, in *Pitts v. Cherry*, Civil Action No. 11946 (N.D. Ga. 1969)." September Order, p. 6.

3. **Fulton.** "Fulton County completed desegregation of its school system in 1970 pursuant to this court's order in *Hightower v. West*. The final desegregation order in *Hightower v. West* was affirmed by the Fifth Circuit Court of Appeals at 430 F.2d 552 (5th Cir. 1970)." September Order, p. 6.

Based on its findings of fact, the district court concluded:

"The court has found that the defendant schoo[1] systems remaining in this case [Atlanta, DeKalb, Fulton] have either been declared unitary or are presently operating under final desegregation orders of this court. Once a system is declared unitary, it would stand to reason that the past history of segregation in that system would no longer be relevant to an inquiry into the existence of present-day constitutional violations. Furthermore, plaintiffs have shown no intent to discriminate on the part of any school official of any defendant school system during the years since they were declared unitary or have been operating under court-ordered plans. The court, therefore, finds that there have been no constitutional violations by school officials of the defendant school systems which would justify the imposition of the interdistrict remedy sought by the plaintiffs." September Order, pp. 26-27.

C. **Housing Evidence.**

The district court found as a matter of fact that none of the Appellee school boards had committed any constitutional violations. It then turned its attention to Appellants' contention that the actions of other state and local governmental officials had caused racially segregated housing patterns which in turn led to racially segregated schools in the six-county Atlanta metropolitan

area, and concluded:

> "The court has considered the housing evidence presented and has found no other [reference to *Crow v. Brown* discussed on pp. 11-12 below] housing violations since the defendants have been either declared unitary or have been operating under a court-imposed desegregation plan. The court concludes that whatever effect past housing violations have had upon the schools is too attenuated to constitute the type violation which would justify imposition of an interdistrict remedy." September Order, p. 32.

The district court also rejected Appellants' contention that segregated housing patterns which may have been influenced by the actions of government officials in the past persist today because of governmental action. Instead, the district court found:

> "To the extent that racial patterns persist, they are currently in existence because of personal preference and economic constraints." September Order, p. 33.

The district court emphatically rejected Appellants' contention that concentration of the black population within the City of Atlanta, rather than in the outlying counties, was the result of governmental action. From 1950 to 1977, the black population of the City of Atlanta more than doubled, from 121,416 to 256,470. Defendants' Exhibit Expert 13. As to whether or not this rapid growth was significantly caused by governmental action, the district court found:

> "Compelling evidence leads the court to conclude that *the rapid increase in black population in Atlanta was not, significantly, the result of any governmental action by any of the defendants.* Indeed, *in those days* [referring to the 1940's and 1950's], the initial reaction of Atlanta's government, restricting blacks to certain inadequate areas, tended to discourage the influx.

> Repeated attempts to erect actual or symbolic 'barriers' to the expansion of black residents in the Atlanta district have been shown (Sec. III, 3). The fact that Atlanta's black population increased *was not the result of governmental design* but, as the evidence shows, in spite of such governmental designs as were then implemented." (Emphasis added) September Order, pp. 21-22.

With regard to specific acts of governmental discrimination shown by Appellants, the evidence was that these took place almost entirely within the City of Atlanta with no impact on either Fulton or DeKalb Counties, and therefore of no relevance in this interdistrict case.[3]

For example, Appellants' evidence included a 1924 ordinance of the City of Atlanta containing racial occupancy designations and a 1931 ordinance of the City of Atlanta prohibiting a racial change in housing units. September Order, pp. 10-11. Similarly, Appellants introduced evidence showing that the governmental officials of the City of Atlanta utilized zoning laws to require buffers between black and white residential areas in the City, such as industrial parks, green zones and a public housing project. In addition, various committees and commissions were formed in the 1940's and early 1950's for the purposes of dealing with the expanding black population within the City of Atlanta. However, the district court found that these various barriers and buffers had no effect. September Order, p. 22. As to the various committees and associations organized to influence residential choices, the district court found that "[t]hey, too, appear to have failed." September Order, p. 22. Even Q. V. Williamson, a

[3] The district court's reference to Appellants' evidence as "truly staggering" referred to the quantity of documentary evidence introduced by Appellants. Its quality and credibility was another story, as recognized by the district court.

lifelong real estate agent and developer in Atlanta who was Appellants' housing expert most familiar with the City of Atlanta, testified that such attempts by Atlanta's governmental officials had been abject failures. Q. V. Williamson dep., pp. 88-89. Finally, these governmental actions had ended by 1966, as testified to by Mr. Williamson. Q. V. Williamson dep., p. 90. In summary, such actions had only a temporary effect in the City and none in the surrounding counties.

Moreover, the district court expressly found that neither the City of Atlanta nor the outlying counties had undertaken to keep blacks in Atlanta and out of the surrounding counties:

> "While, as noted above (Sec. III), there is evidence of historical governmental activity which tended to separate residents on a racial basis *within the City of Atlanta,* plaintiffs offered no evidence found convincing by the court that the City of Atlanta cooperated by agreement, concert of action, or other tacit or express undertaking with any other district, the object of which was to increase the black population within the Atlanta district and hold it down in any other district(s)." (Emphasis added) September Order, p. 21.

With regard to alleged efforts by governmental officials in either Fulton or DeKalb County to discourage black growth in those counties, the only violation deemed at all significant by the district court was based on the events in *Crow v. Brown,* 332 F.Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972) in which a district court judge held that the Fulton County Commissioners had unconstitutionally denied building permits for two low-income public housing projects in unincorporated Fulton County. However, after considering the evidence, the

district court in this case found that whatever initial impact this violation might have had on housing patterns between Fulton County and Atlanta no longer persists and has been corrected. September Order, p. 31.

With regard to the reason why little conventional public housing had been constructed by Housing Authorities outside the City of Atlanta since the decision in *Crow v. Brown, supra,* the district court found that "from 1973 to 1978 there was a moratorium on release of federal funds for the construction of conventional low cost housing." September Order, p. 17.

Finally, Appellants' contention that blacks have been discouraged from living in either Fulton or DeKalb County is refuted by undisputed demographic evidence which shows that from 1960 to 1977, the black population of both DeKalb and Fulton Counties (not including Atlanta) increased by approximately 100%, from 12,696 to 26,100 in Fulton County, and from 27,775 to 53,300 in DeKalb County. Defendants' Exhibit Expert 13. During the same 17-year period, the black population of the City of Atlanta increased by only 47%. Defendants' Exhibit Expert 15.

Both Appellants and Appellees introduced extensive expert testimony on the issue of what caused the current segregated housing patterns in metropolitan Atlanta. Appellants' expert, Dr. Karl Taeuber, testified that governmental discrimination had been the significant determinant of segregated housing patterns, and that the impact of other factors, such as personal preference and economics, was minor. Appellees presented testimony from three experts on the housing issue: Dr. William Clark, a geographer, Dr. Anthony Pascal, an urban economist, and Dr. David Armor, an expert in interpreting

public opinion polls. These three experts testified that economics, personal preferences, job locations, geographic features and social contacts were the primary causes of segregated housing patterns, and that the role of governmental action in causing these patterns was minor. Pascal testimony, p. 36, Armor testimony, p. 33, Clark testimony, p. 42.

In considering the expert testimony, the district court expressly rejected the testimony of Appellants' expert, Dr. Taeuber, that governmental discrimination was the primary cause of residential segregation, and instead found:

> "Of the factors which influence housing decisions, economic restraints and personal preference appear to be the strongest." September Order, p. 19.

The district court was especially persuaded by the testimony of Dr. David Armor, one of Appellees' expert witnesses, who graphically demonstrated the tremendous impact of personal choice of both blacks and whites on the formation of segregated housing patterns. The district court found:

> "The court was impressed by defendants' expert testimony as to the role of personal preference in housing decisions." September Order, p. 19.

In explaining why so few truly integrated neighborhoods exist in Atlanta, as well as other major urban areas, the district court was persuaded by Dr. Armor's testimony regarding the "tipping point" phenomenon which has the effect of creating transitional, rather than stable integrated neighborhoods. The district court found:

> "The court finds that there is evidence that the so-called 'tipping phenomenon,' which involves elements of fear, personal prejudice, and other

psychological and economic factors, may partly explain the evolution of transitional neighborhoods from totally white to almost totally black composition, leaving few integrated neighborhoods existing in the Atlanta area today. The court finds convincing the evidence that there is a point at which the presence of certain numbers of persons of another race which will cause one to feel uncomfortable about residing in the neighborhood. The court also finds convincing the evidence that the 'tipping point' may differ for whites and blacks." September Order, p. 20.

Taking all this evidence into account, the district court concluded:

> "*Governmental action has, thus far, failed to limit or broaden the area into which people have moved.* The evidence shows that when the factors that influence choice of residence (economic, personal preference, etc.) have so indicated, people will move into any part of metropolitan Atlanta they desire. *In the absence of such factors, neither obstruction nor encouragement by government seems to achieve significant results.*" (Emphasis added) September Order, p. 22.

ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION OVER THIS DIRECT APPEAL FROM THE JUDGMENT OF A THREE-JUDGE DISTRICT COURT.

This issue is fully briefed in the Motion to Affirm and Brief filed by Appellee State Board. We incorporate the State Board's Brief, and refer the Court to it for a full discussion of the facts and authorities relevant to this issue.

II. THE DECISION AND JUDGMENT OF THE THREE-JUDGE DISTRICT COURT IS CLEARLY CORRECT AND SHOULD BE AFFIRMED WITHOUT FURTHER ARGUMENT.

In dismissing this action, the district court concluded:

> "Plaintiffs have failed to show any constitutional violation by the State of Georgia or any of its subdivisions, including defendant school boards, which has had an interdistrict effect, so that the court would be justified in imposing an interdistrict remedy." September Order, p. 33.

The findings of fact made by the trial court should not be disregarded unless they are clearly erroneous. Rule 52, Federal Rules of Civil Procedure. This is especially true in a school desegregation case where a trial judge must decide whether a constitutional violation, even if it has occurred, is significant enough to justify any remedy. As stated by Justice Stewart in *Columbus Board of Education v. Penick*, 47 U.S.L.W. 4924, 4929 (1979):

> "Similarily intricate may be factual inquiries *into the breadth of any constitutional violation and hence of any permissible remedy.* [Citations omitted]. Those tasks are difficult enough for a trial judge. The coldness and impersonality of a printed record, containing the only evidence available to an appellate court in any case, can hardly make the answers any clearer. I doubt neither the diligence nor the perserverance of the judges of the Courts of Appeals, or of my Brethren, but I suspect that it is impossible for a reviewing court factually to know a case from a 6,600 page printed record as well as the trial judge knew it. In assessing the facts in lawsuits like these, therefore, *I think appellate courts should accept even more readily than in most cases the factual findings of the courts of first instance.*" (Emphasis added).

A. The district court's dismissal of this action was clearly correct because Appellants have not shown that any of their constitutional rights have been violated.

This is an interdistrict or "metropolitan" school desegregation case. Appellants do not seek to desegregate the individual county and city school systems in this case. That has already been accomplished. As found by the district court, each of the Appellee school systems has either been declared unitary or is operating under a court or HEW-approved desegregation plan. September Order, p. 6.

Rather, Appellants argue that because the student population of the City of Atlanta school system is approximately 89% black, as compared to approximately 29% black in the Fulton and DeKalb County school systems (as of 1979-1980 school year), the courts should require the "busing" of students across county and city lines to achieve a more balanced racial mix in the school systems of the metropolitan Atlanta area.

In support of their request for racial balance, Appellants contend that governmental officials have committed constitutional violations having an interdistrict effect, but never address the constitutional deprivation suffered by their own children which an interdistrict remedy is supposed to cure. Thus, in their Jurisdictional Statement, Appellants allege they have established the types of constitutional violations which this Court in *Milliken v. Bradley*, 418 U.S. 717 (1974), involving the City of Detroit, indicated *might* serve as a basis for interdistrict relief without any consideration of the context in which this Court decided the *Milliken* case. *Milliken* was not decided in a vacuum. The Court had before it compelling reasons for an interdistrict remedy *which are totally*

absent in this case. First, in *Milliken,* the evidence showed that black students were receiving an inferior education in the poor inner-city schools of Detroit, while the white children were being educated in wealthy suburban schools. 418 U.S. at 759-761, notes 10-12 (dissenting opinion of Justice Douglas). This is definitely not the situation in this case, as found by the district court:

> "Atlanta, which has the highest percentage of black students of any school system involved in this case, *is also the wealthiest system,* with the greatest expenditure per pupil." (Emphasis added) September Order, p. 6.

In order to accept Appellants' argument, one must adopt the proposition that given equal or, in this case, superior educational resources, black children cannot learn unless white children attend class with them. In a scathing concurring opinion, Judge Sobeloff of the Fourth Circuit Court of Appeals recognized this as a fundamentally racist view:

> "The invidious nature of the Pettigrew thesis, advanced by the dissent in the present case, thus emerges. Its central proposition is that the value of a school depends on the characteristics of a majority of its students and superiority is related to whiteness, inferiority to blackness. Although the theory is couched in terms of 'socio-economic class' and the necessity for the creation of a 'middle-class milieu,' nevertheless, at bottom, it rests on the generalization that, educationally speaking, white pupils are somehow better or more desirable than black pupils. This premise leads to the next proposition, that association with white pupils helps the blacks and so long as whites predominate does not harm the white children. But once the number of white approaches minority, then association with the inferior black children hurts the whites and, because there are not

enough of the superior whites to go around, does not appreciably help the blacks.

> "This idea, then, is no more than a resurrection of the axiom of black inferiority as justification for separation of the races, and no less than a return to the spirit of *Dred Scott*. Were a court to adopt the Pettigrew rationale it would do explicitly what compulsory segregation laws did implicitly." *Brunson v. Board of Trustees of School District No. 1 of Clarendon County, South Carolina*, 429 F.2d 820, 826 (4th Cir. 1970).

Dr. Benjamin Mays, one of the most respected black educators in the Country and the President of the Atlanta School Board since 1970, also rejected Appellants' proposition that black children cannot receive a quality education in a predominantly black school system. March 21, 1978 Trial Transcript, pp. 12-15.

Second, in *Milliken*, there were 86 separate school districts in the three-county Detroit metropolitan area giving rise to tremendous disparities of wealth, socioeconomic background and racial makeup from school district to school district. Again the situation is totally different in this case where there are only ten school districts in the entire six-county Atlanta metropolitan area. In this case, there are no separate school districts for rich white neighborhoods and poor black neighborhoods, as there were in Detroit. School districts are large, based on long established county or city boundaries, not neighborhoods, and people of all backgrounds and socioeconomic classes live within each district. Thus, the City of Atlanta school district contains some of the most expensive neighborhoods in the metropolitan area, as well as some of the poorest. Defendants' Maps 1-10. Through the majority to minority voluntary busing program, chil-

dren from the poorest neighborhoods attend schools with children from the richest neighborhoods, and vice versa. This was *not* the case in Detroit where the rich white neighborhood had its own separate school district and the only way the poor black child in the adjoining poor black neighborhood, a separate school district, could attend the educationally superior school in the white neighborhood was by *cross-district* busing.

Finally, in Detroit, as well as every case in which an interdistrict remedy has been ordered, there has been a strong necessity of court intervention to insure desegregation of the central city school district, quite aside from any question of interdistrict relief.[4] The court in those cases was faced with having to impose a school desegregation plan *in any event* to remedy *intradistrict* violations regardless of the issue of interdistrict relief. For example, in *Milliken*, it was only after the district court concluded that the Detroit city school system was violating the Constitution that it decided to consider whether interdistrict relief might be appropriate. 418 U.S. at 744-745.

Again, this case is quite different. The district court has found that each of the Appellee school systems is either unitary or is already operating under a court or HEW-approved desegregation plan. Unlike the metropolitan school cases in Detroit, Louisville, Wilmington

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[4] *Evans v. Buchanan*, 393 F.Supp. 428, 430 (D. Del.), *aff'd*, 423 U.S. 963 (1975) (Wilmington, Delaware); *Newburg Area Council, Inc. v. Board of Education of Jefferson County, Kentucky*, 510 F.2d 1358, 1359 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975) (Louisville, Kentucky); *United States v. Board of School Commissioners of the City of Indianapolis, Indiana*, 503 F.2d 68, 79 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). *See also Bradley v. School Board of the City of Richmond, Virginia*, 462 F.2d 1058, 1061 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (Interdistrict relief denied).

and Indianapolis, where the central school systems were *not* operating in a unitary manner, the Atlanta school system is unitary, as are the school systems of other Appellees. Consequently, there is no reason for any new desegregation plans in any of the Appellee school districts. The Appellants and their children, who reside in Atlanta, attend school in a unitary school system. Therefore, they are not being deprived of any of their constitutional rights. This Court has made it absolutely clear that the extent of a child's constitutional rights is to attend a unitary school system in the district in which he resides. *Milliken v. Bradley*, 418 U.S. 717, 746 (1974); *Spencer v. Kugler*, 326 F.Supp. 1235, 1240-41 (D. N.J. 1971), *aff'd*, 404 U.S. 1027 (1972). As this Court put it in *Milliken:*

> "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." 418 U.S. at 746.

Ignoring this basic shortcoming of their case, Appellants contend that an interdistrict remedy should be imposed anyway. In view of the wealth of the Atlanta school district, the sole basis for an interdistrict remedy in this case would be to racially balance the schools of the Atlanta metropolitan area. However, this Court has repeatedly held that there is no constitutional requirement that schools be racially balanced. In *Milliken v. Bradley, supra*, Chief Justice Burger reiterated this well-settled constitutional principle:

> " 'If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.' 402 U.S. at 24.
>
> The clear import of this language from *Swann* is that desegregation, in the sense of dismantling a dual

> school system, does not require any particular racial balance in each 'school, grade or classroom.' " 418 U.S. at pp. 740-741.

For fifteen years following this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), Atlanta schools were in a state of turmoil. In 1958, the schools were 70% white. *See Calhoun v. Cook*, 522 F.2d 717, 718 (5th Cir. 1975). By the 1977-1978 school year, substantially all of the whites had fled the Atlanta public schools (but not the City), and the schools were only about 11% white. In 1974, the Atlanta school desegregation case was finally resolved and approved by the Fifth Circuit Court of Appeals and stability returned to Atlanta's schools. For the last seven years, the Atlanta School Board, under the leadership of Dr. Benjamin Mays has steadily improved the quality of education in Atlanta schools. By this lawsuit, Appellants would once again cause a massive upheaval in the schools of the Atlanta area, not for the purpose of obtaining quality education for black students or more black teachers and administrators, but for the sole purpose of achieving a racial balance more comparable to the racial balance of the metropolitan area as a whole. We submit that, *in the absence of a present need to remedy some substantial constitutional violation in one or more of the districts involved,* a desire to simply achieve racial balance through cross-district busing is not sufficient justification under the decisions of this Court to impose new and sweeping court-ordered busing plans on the schools of a major metropolitan area.

B. **Even assuming Appellants or their children have a constitutional right to attend racially balanced schools, the district court's findings of fact and conclusions of law that Appellants have failed to show any constitutional violations of an interdistrict nature which would require**

an interdistrict remedy are supported by ample evidence and are clearly correct.

Given the facts before it, the Supreme Court in *Milliken* dismissed the complaint against the suburban school districts, but indicated that under other more compelling circumstances, an interdistrict remedy *might* be appropriate to remedy a present denial of constitutional rights. In describing these circumstances, the Court stated:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy *might* be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation *directly caused* by the constitutional violation. Conversely, without an interdistrict violation *and* interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." (Emphasis added) 418 U.S. at 744-45.

As examples of the sort of "interdistrict" violations having "interdistrict" effects which might justify some form of interdistrict relief, the Court referred to:

(a) The drawing or alteration of school district lines on a racial basis (418 U.S. at 744, 745, 748, 755),

(b) The carving out of new school districts on a racial basis (418 U.S. at 744, 755), and

(c) Arrangements whereby white children residing in the largely black city school district could attend schools in the largely white school suburban district (418 U.S. at 746-747).

There is no evidence of such interdistrict violations in this case. First, the district court expressly found that there had been no drawing, alteration or carving out of new school district lines on a racial basis. September Order, p. 7. Nor have there been any county or municipal boundary line changes having either a segregative purpose or effect. September Order, p. 7.

There is also no evidence that white students were ever bused or transferred out of the City of Atlanta school system to any of the other Appellee school districts in order to avoid desegregation. Conversely, the record shows that the effect of governmental action was clearly integrative, *i.e.*, to substantially increase the number and percentage of white students attending public schools in the Atlanta school system. For example, by far the most significant boundary line change affecting the Atlanta school district was the "Plan of Improvement" in 1952. The City of Atlanta annexed the entire northern part of the present City and a community in Southwest Atlanta from the County. The net effect of this annexation was to increase the white population of the City by seven percent, with only a negligible reduction in the percentage of the black population of Fulton County, *i.e.*, less than ⅓ of one percent. Defendants' Exhibits FL-74 (Atlanta attendance figures 1950-51 through 1953-54).

Appellants contend that historically governmental

action contributed to separation of races in education. That point is hardly in dispute. Prior to the *Brown* decision in 1954, Georgia law required separate schools for black and white children, as did the laws of all other southern states. After *Brown*, there was a period of transition during which the schools were desegregated. However, segregation in the schools during that period of time or prior to *Brown* is not at issue in this case. The district court quite properly found that once a school district has purged itself of prior segregation and become unitary, as each of the districts in this case has, such prior segregative acts should no longer be relevant. September Order, p. 26.

Moreover, the fact that some black students had to travel to Atlanta, Marietta or Decatur to attend high school during the era of state-mandated segregation did not preserve segregation in the schools. During that period of Georgia history, *all* public schools in Georgia were segregated by law, with interdistrict transfers having nothing to do with the color of the school attended by black students. Such transfers merely enabled black students living outside of Atlanta to get a high school education which they might not otherwise have received.[5]

In any event, there was similar evidence in *Milliken* of black children from the surburban districts attending schools in the City of Detroit. This Court expressly re-

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[5] In their Jurisdictional Statement, Appellants imply that the district court found that the black community expanded within the City of Atlanta, rather than the surrounding counties, because of the location of the black high schools in the City and other governmental acts. See pp. 20, 36 (n.11), 37 of Jurisdictional Statement. This is misleading, at best. As discussed on page 9 above, the district court in no uncertain terms rejected Appellants' contention that government action had caused the concentration of the black population in Atlanta. September Order, p. 21.

jected the proposition that these type of isolated incidents could serve as the basis for interdistrict relief. 418 U.S. at 750.

Under the majority opinion written by Chief Justice Burger in *Milliken*, the district court's conclusion that Appellees had committed no constitutional violations which would justify the imposition of a massive interdistrict remedy is plainly correct. In recognition of this, Appellants structured virtually their entire case around evidence of governmental discrimination in housing, rather than schools, in reliance on language in Justice Stewart's concurring opinion in *Milliken*. However, Appellants miss the essential thrust of Justice Stewart's opinion, which was:

> "The opinion of the Court convincingly demonstrates, *ante*, at 742-743, that traditions of local control of schools, together with the difficulty of a judicially supervised restructuring of local administration of schools, render improper and inequitable such an interdistrict response to a constitutional violation found to have occurred only within a single school district." 418 U.S. at 755.

In this case, unlike *Milliken*, the district court did not find a constitutional violation in even one of the ten Appellee school systems, but expressly found that the Appellee school systems were in compliance with the Constitution. Appellants, with good reason, ignore Justice Stewart's embrace of the essential holding of *Milliken*, and instead rely on the following *dictum* from his concurring opinion:

> "This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example,

> that state officials had contributed to the separation of the races by . . . purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." 418 U.S. at 755.

In this case, Appellants contend that governmental action was a significant cause of segregated housing patterns in the Atlanta metropolitan area.[6] Most of their evidence consisted of a number of separate and isolated racially discriminatory incidents which occurred within the City of Atlanta. However, in *Milliken, supra*, Justice Stewart made it clear that evidence relating to segregative acts within the central city are irrelevant in an interdistrict case. As stated by Justice Stewart: "However, segregative acts within the city alone cannot be presumed to have produced—and no factual showing was made that they did produce—an increase in the number of Negro students *in the city as a whole*." 418 U.S. at 756, n.2.

Appellants' evidence relating to Atlanta has been described in the Statement of Facts above, and will not be repeated here. The bottom line on such evidence of discriminatory acts were that they had little, if any, effect within the City of Atlanta, *no interdistrict effect*, and in any event had ended by 1966. With regard to the rapid growth of the black population in Atlanta, the district court expressly found that such growth was not the result of governmental action. September Order, p. 21.

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[6] Appellants contend that there was no housing evidence in the Detroit case on which Justice Stewart could rely. We note for the Court that there was extensive housing evidence introduced in the Detroit case. In fact Appellants' chief housing witness in this case, Dr. Karl Taeuber, also testified on housing patterns in Detroit, and, interestingly enough, gave almost the same opinion in *Milliken* as he did in this case. Trial Transcript, *Milliken v. Bradley, supra*, examination of Karl Taeuber, pp. 357-364.

There has also been a total failure on the part of Appellants to establish any attempts by governmental officials inside or outside of Atlanta to limit expansion of the black community to the City of Atlanta. In attempting to explain why significant black expansion occurred first in Atlanta and only later in the outlying counties, Appellants' witnesses ignored the fact that there was ample vacant land within the City of Atlanta to accommodate black expansion prior to the mid-1960's. At the time of the alleged violations in the City of Atlanta, both DeKalb and Fulton County were largely rural areas. Because of the lack of transportation to the central city and the lack of jobs in the outlying rural areas, there was no reason for there to be black expansion in those areas until such time as they had sufficient jobs and housing. These events did not occur until the 1960's and 1970's. When that occurred, so did black (and white) growth in the suburbs. Thus, the availability of jobs, not governmental action, is what caused black population growth to occur first in Atlanta, and later in Fulton and DeKalb Counties. It is difficult to imagine how the closing of a road in the City of Atlanta, the zoning of an industrial zone in the City of Atlanta, or other similar governmental action could have any impact on housing patterns outside of the City of Atlanta, particularly when Appellants' own evidence establishes that such attempts, even in the City, were completely unsuccessful. Moreover, as the district court observed, ". . . plaintiffs have not shown that any of them has sought and been denied *any* housing because of governmental discrimination." September Order, p. 21.

The record is devoid of any evidence of governmental action outside the City of Atlanta which had the necessary substantial interdistrict impact. The incidents mentioned by the district court in its findings of fact either

took place in the distant past and had no lasting impact, or were *de minimus* in nature, or were purely intradistrict in their effect.

The only housing violation which the district court deemed significant in either county were the incidents leading up to the district court's decision in *Crow v. Brown, supra,* and it specifically found that these incidents had no current effect. In *Crow v. Brown,* the district court judge held that the Fulton County Commissioners had unconstitutionally denied building permits for two public housing projects to be built outside the City of Atlanta in unincorporated Fulton County. However, the district court ordered the permits granted, and the projects were then built and opened for occupancy in 1974.

Whether the building permits were denied for improper reasons is *not* at issue in this case. The relevant issue is what effect the denial of these building permits had on the disparity between the percentage of blacks living in Atlanta and the percentage of blacks living in the rest of Fulton County. On that issue, the district court concluded that whatever impact the events of *Crow v. Brown, supra,* originally had on housing patterns were corrected when the projects were opened. September Order, p. 31. Undisputed evidence showed that over three years after they were opened, one project was only 42% occupied and the other was only 74% occupied, while at the same time there were 7,200 families, mainly black, waiting to get into public housing in the City of Atlanta. September Order, p. 18; Defendants' Exhibits Fulton 26B,29. By contrast, projects built during the same period in Atlanta were fully occupied within a short time. Defendants' Exhibit Fulton 26A,29. Rather than moving to these two outlying projects which they had a clear right to do and

which had plenty of room, these black families preferred to remain on a waiting list so they could move into public housing located in the City of Atlanta. Relying on this evidence which demonstrated an overwhelming preference and need for such housing in the City, rather than the outlying counties, the district court found that ". . . whatever impact the original violation had on residential patterns has been corrected by the opening of the two projects." September Order, p. 31.

In summary, the findings of the district court, which are supported by ample and often undisputed evidence, establishes that the events of *Crow v. Brown, supra,* have had no impact whatsoever on current residential housing patterns of Atlanta and Fulton County. Moreover, the experience with Boatrock and Red Oak, the two housing projects in *Crow v. Brown,* provides convincing empirical evidence that the construction of public housing in Atlanta where it was needed, rather than in the then rural surrounding areas, was a wise decision and did not serve to keep black citizens out of suburban areas. In 1974, the 7,200 largely black families on the waiting list of the Atlanta Housing Authority preferred to wait for public housing in the City of Atlanta rather than move into brand new public housing in more suburban areas. We submit they would have been even more reluctant to do so thirty years ago when those same suburban areas were largely rural. The plain inescapable fact is that the public housing was desperately needed in Atlanta, and that is why more was built there, and not in Fulton or DeKalb Counties.[7]

[7] Even Appellants' expert, Taeuber, acknowledged it would make no sense to build more conventional public housing in outlying Fulton County when existing projects are not fully occupied. Trial Transcript, Vol. III, p. 21.

In their Jurisdictional Statement, Appellants criticize the district court for focusing more on governmental actions during the last 10 to 20 years than on Atlanta's racial history in the 1930's, 1940's and 1950's. However, Appellants rely on isolated, anecdotal-type evidence of historical incidents with no consideration whatsoever of the lack of impact of such incidents. In order for such incidents to be relevant at all, they must have contributed to the disparity between the racial makeup of Atlanta and the surrounding counties. The plain facts of the matter are that in 1958, after most of the historical acts of discrimination alleged by Appellants took place, the Atlanta school system was only 30% black, approximately the same racial makeup as the Fulton and DeKalb County school systems today. *See Calhoun v. Cook*, 522 F.2d 717, 718 (5th Cir. 1975). Therefore, governmental acts occurring prior to 1958 had demonstrably not caused Atlanta to be a majority black school system. It has only been since then, a period during which even Appellants' witnesses acknowledge government discrimination has largely ceased, that the Atlanta school system has become 89% black. Therefore, the district court quite properly focused on the 1960's and 1970's, rather than the 1930's, 1940's and 1950's, to determine what had happened to cause this rapid increase in the black school population of Atlanta. After considering the evidence, the district court concluded that it was not the result of governmental action. September Order, pp. 21-22.

The district court was impressed with the expert testimony presented by the Appellees (September Order, p. 19), and relied heavily on it for its findings of fact that economics and personal preferences were largely responsible for Atlanta's segregated housing patterns, not governmental action.

Appellees presented three expert witnesses in the area of housing. Dr. William Clark, a professor of urban geography, testified concerning the spatial aspects of the six-county region and their importance in influencing the growth of black communities. Using detailed maps and overlays, he demonstrated that the expansion of the black community in Atlanta had proceeded in a manner consistent with what he would expect based on his observation of the expansion of black communities in other cities, given the natural and structural barriers that are peculiar to Atlanta, such as location of railroads, the central business district, industrial areas, major rivers and expensive housing, and the tendency of people to try to maintain their social and business contacts when selecting a place to live. Dr. Clark, pp. 32-43; Defendants' Maps 1-10.

As part of his testimony, Clark also showed that the black population in the suburban districts of Atlanta has increased dramatically in the last two decades, both in terms of percentage and absolute growth, contrary to Appellants' allegations that blacks have been limited to living in the City of Atlanta. Dr. Clark, pp. 26-28; Defendants' Exhibits Expert 13, 14, 15. *See also* Nov. Trial Transcript, Vol. II, p. 217.

Following Dr. Clark, Dr. Anthony Pascal, an urban economist, presented testimony showing the impact of socio-economic factors, *i.e.*, the ability of blacks to afford available housing and job locations, in causing the current housing patterns in the six-county region. Dr. Pascal, p. 11. The results of Dr. Pascal's study of the Atlanta area showed that these factors alone account for approximately three-fifths to two-thirds of the segregation currently existing in housing patterns in the six-county area. Dr.

Pascal, pp. 14-17, 22-27, 35-36; Defendants' Exhibits Expert 18, 19. His study also showed that differences in the same socio-economic characteristics between blacks and whites accounted for a substantial portion of the reason why the suburban districts were largely white and the City of Atlanta was majority black, a critical issue which Appellants' experts failed completely to address. Dr. Pascal, pp. 17-22; Defendants' Exhibits Expert 16, 17.

Pascal also presented the results of a study conducted by him which showed that the location of a majority of the public housing in Atlanta has had a minimal impact on housing patterns in the six-county region. Dr. Pascal, pp. 31-35; Defendants' Exhibit Expert 20.

Appellees' last housing expert was Dr. David Armor, a sociologist, who is an expert in the methodology and interpretation of public opinion polls surveying racial attitudes. Dr. Armor, pp. 4-10; Defendants' Exhibit Expert 6. Armor presented a summary of the various public opinion polls (including the only poll on Atlanta which Appellants' expert Taeuber ignored) which have been conducted to determine what type of neighborhoods both blacks and whites prefer. Dr. Armor, pp. 18-24; Defendants' Exhibit Expert 22. Based on these polls, Armor testified that, in his opinion, approximately 55% to 60% of the segregation that currently exists in Atlanta would still exist even if all blacks were redistributed throughout the Atlanta metropolitan area based *only on black preferences*. Dr. Armor, pp. 31-32; Defendants' Exhibits Expert 23, 24. Armor further testified that it would be extremely unreasonable to consider only the personal preferences of blacks since the personal preferences of whites are also very important. Dr. Armor, p. 29. For example, even though a black may be willing to move into a neighborhood that is 50% white, this will not result in the neighborhood re-

maining 50% white unless the whites that live in the neighborhood remain there and whites are willing to move into the neighborhoods in the same proportion as blacks. Armor's study showed that in fact whites choose not to move into neighborhoods of the type that are preferable to blacks, and in fact try to move out of such neighborhoods. Dr. Armor, pp. 23-24, 29-31; Defendants' Exhibits Expert 22, 23. Dr. Armor testified that the impact of the combination of the preferences of blacks and whites is transitional neighborhoods. That is, as blacks move into previously all-white neighborhoods, the whites move out, resulting in a rapid turnover of neighborhoods in those areas from white to black, thereby continuing the concentration of blacks in majority or all-black neighborhoods and whites in white or largely white neighborhoods. Dr. Armor, pp. 3[illegible]-36. To demonstrate empirically the effect of black and white attitudes, Armor presented a study which showed a rapid turnover in residential areas from white to black in South DeKalb County consistent with the results of the polls summarized by him in his testimony. Dr. Armor, pp. 34-36; Defendants' Exhibit Expert 25.

Based on his review of the existing polls, Dr. Armor concluded that the preferences of blacks and whites taken together account for a large proportion of the racial characteristics of housing patterns in the six-county region. Dr. Armor, pp. 32-33; Defendants' Exhibits Expert 23, 24.

In summary, the testimony of Drs. Clark, Pascal and Armor showed that the racial characteristics of housing patterns in the six-county region were largely the result of:

(1) natural and structural barriers to black expansion, including commercial and industrial areas, rivers and expensive neighborhoods, which, because of the natural

desire of people to maintain their social contacts, *i.e.*, churches, friends and business associates, influenced expansion of black neighborhoods in certain directions and not others;

(2) socio-economic factors such as the fact that blacks work in disproportionately high numbers in the City of Atlanta and the fact that on the average blacks cannot afford as expensive housing as whites; and

(3) personal preferences of blacks and whites to live in neighborhoods of differing racial composition.

Given the overwhelming importance of these factors in causing current housing patterns and their review of all of the evidence in this case, Drs. Armor, Clark and Pascal all concluded that the influence of government action, which in any event is impossible to predict with any certainty because of the lack of any empirical evidence of the impact of such actions, was minimal in causing the current housing patterns in the six-county region.

By contrast, the opinion of Appellants' experts was that economics and personal preferences played a minor role, and that governmental action was the primary factor causing segregated housing patterns.[8] Needless to say, the district court rejected their conclusions in no uncertain terms, and instead was convinced by the testimony of Appellees' expert witnesses. September Order, pp. 19-21.

[8] Since the district court failed to give their testimony any credence, we have not discussed in detail the testimony given by Appellants' experts, Drs. Karl Taeuber and Franklin Wilson. However, if the court wishes to compare their testimony with Appellees' expert witnesses, a critique of all the expert testimony relating to the housing issue is included in the Appendix to Appellees' trial brief.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Order and Judgment of the district court dismissing this action was clearly correct, and can and should be affirmed without the need for further briefing on the merits or oral argument.

Respectfully submitted this _____ day of _____, 1980.

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IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-6108

EMMA ARMOUR, et al.,

Appellants,

v.

JACK P. NIX, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION TO AFFIRM WITH SUPPORTING BRIEF ON BEHALF OF THE STATE APPELLEES

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Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the State Appellees (i.e. those defendants below comprising the State Superintendent of Schools and State Board of Education of the State of Georgia), and pursuant to Rule 16 of this Honorable Court move that the final judgment and decree of the statutory three-judge District Court be affirmed on the grounds: (1) that the decision below is more than amply supported by the evidence presented, and is so obviously correct in light of this Court's prior adjudications as not to warrant further

argument, and (2) because it is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument.

This ____ day of April, 1980.

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

PART I

PRELIMINARY STATEMENT

This case is an attack upon the existence of county and city government in Georgia—at least insofar as its qualitatively and quantitatively most important governmental function, "public Education", is concerned.[1] While pat-

[1] Unlike the situation in many states where a large number of tiny splinter school districts are sometimes found within a single county, education in Georgia is basically a function of county government. E.g. Art. VIII, Sec. V, Par. II, of the Constitution of the State of Georgia of 1976 (Ga. Code Ann. § 2-5302), *Stewart v. Davidson*, 218 Ga. 760, 763 (1963); *Wallis v. Blue*, 263 F. Supp. 964, 970-971 (N.D. Ga. 1967). While some cities, as Atlanta, have been permitted to continue their own independent school systems, the State Constitution prohibits the creation of new "city" school systems. Art. VIII, Sec. V, Par. VI, of the Constitution of the State of Georgia of 1976 (Ga. Code Ann. § 2-5306). A county board of education is the county's governmental authority in school matters. *Rosser v. Meriwether County*, 125 Ga. App. 239, 241-242 (1971).

terned after previous unsuccessful attempts to have courts set aside the boundaries of separate and autonomous school districts in order to improve "racial balance",[2] the present case would go far beyond anything yet asked of the courts in a number of ways.

To start with, there is simply the mammoth size of the judicial undertaking requested. While they have at various stages of the litigation below said they wanted "consolidation" or a "federation structure", and at other times spoken in terms of "contractual arrangements", it is clear that regardless of label, appellants (plaintiffs below) want the six counties and four cities they have named as defendants to operate jointly as a unitary structure "without the limitation of political boundary lines". *See* Amended and Substituted Complaint, pp. 38-40. As the three-judge district court noted, the six county area involved extends 70 miles from southwest to northeast and approximately 50 miles in every other direction. The area covers 1,925 square miles, which is roughly equal to the entire state of Delaware, or the entire state of Rhode Island. *See* Order dated March 2, 1978. The consolidated, federated, or otherwise combined "school district" proposed by appellants would have in excess of 300,000 pupils. It may be remembered that in denying interdistrict relief in *Bradley v. School Board of the City of Richmond, Virginia*, 462 F.2d 1058, 1062, 1068 (4th Cir. 1972), *aff'd. by an equally divided court*, 412 U.S. 92 (1973), the Court of Appeals was taken back by the prospect of creating a mere 750 square mile school district having 100,000 students.

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[2] Appellants' original complaint, filed in 1972, appeared to track *Spencer v. Kugler*, 326 F.Supp. 1235 (D. N.J. 1971) [3-judge district court], *aff'd.*, 404 U.S. 1027 (1972). Their "Amended and Substituted Complaint," filed in 1975, was drafted in light of *Milliken v. Bradley*, 418 U.S. 717 (1974).

A second way in which this case differs from the other "metro" or "multi-district" cases which have reached this Court is that with the possible exception of *Spencer v. Kugler*, 404 U.S. 1027 (1972) [interdistrict remedy denied], all prior actions appear to have involved a central city school district which was found by the court to be racially nonunitary—the plaintiffs residing *in those districts* consequently incurring a constitutional deprivation or injury about which they had standing to complain. *See*, e.g. *Milliken v. Bradley*, 418 U.S. 717, 725-726 (1974) [interdistrict remedy denied]; *Bradley v. School Board of City of Richmond, Virginia*, 462 F.2d 1058, 1061 (4th Cir. 1972), *aff'd. by an equally divided Court*, 412 U.S. 92 (1973) [interdistrict remedy denied]; *Evans v. Buchanan*, 393 F.Supp. 428, 430 (D. Del. 1975), *aff'd.*, 423 U.S. 963 (1976) [interdistrict remedy allowed]; *Newburg Area Council, Inc. v. Board of Education*, 510 F.2d 1358, 1359 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975) [interdistrict remedy allowed]. In the present case the appellants reside in the City of Atlanta, a city whose school system had been adjudicated to be unitary before the instant complaint was filed. Indeed the three-judge district court below noted not only the unitary status of the City of Atlanta's schools, but also pointed out that the other defendant counties and cities in the action were in substantially the same situation—all being either unitary or operating under court-imposed desegregation plans. It appears, in other words, that unlike the plaintiffs in the other cases (excepting *Spencer v. Kugler*), appellants in this case, being residents of Atlanta, were already enjoying that which this Court declared in *Milliken v. Bradley*, 418 U.S. 717, 746 (1974), to be their constitutional right, i.e. "to attend a unitary school system *in that district*."

A third way in which this case differs from at least some

of the other metro cases is that the situation is not one of an impoverished, underfunded central city school system (predominantly black) surrounded by more affluent suburban school systems (predominatly white). *See Milliken v. Bradley*, 418 U.S. 717, 759-760 (1974) [dissenting opinion of Mr. Justice Douglas]. To the contrary the City of Atlanta, where appellants reside, has throughout the period covered by this litigation had a greater school property tax digest per pupil than any of the other defendant counties or cities, and the City of Atlanta has in fact consistently expended more moneys per pupil than any of the other defendant counties or cities.

A fourth way in which this case differs from most of the other "metro" or "multi-district" cases to reach this Court is the already mentioned county and city organization and operation of public schools in Georgia—as distinct from the large number of small splinter school districts often seen elsewhere.[3] In addition to the much deeper roots of counties and cities as means of local self-government than sub-county "school district", this larger operating unit (i.e. county or city) tends to reduce inter-district disparities of per-pupil wealth, socio-economic conditions, and racial composition, from the level apt to prevail where the smaller splinter districts exist. Unlike the situation in the Detroit area [interdistrict remedy denied] or Wilmington, Delaware area [interdistrict remedy allowed], for example, all of the "school districts" (i.e. counties and cities) in the present litigation have "public housing", and all have more than "token" numbers of black and white students.

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[3] In the Detroit "metro" case there were 85 school districts in the three county metropolitan area. *See Milliken v. Bradley*, 418 U.S. 717, 729-730 (1974).

For reasons we shall come to, the more than slightly mind-boggling proposition advanced by appellants, namely that six rather large counties and four cities should be required to consolidate, federate, or otherwise compelled to operate their school systems jointly and without regard to political boundaries (presumably requiring joint or common administration with uniform decisions as to curricula, course offerings, spending and taxation) is without precedent, is unsupported by and indeed quite contrary to the evidence adduced. It was so correctly rejected by the three-judge district court below under prior adjudications of this Honorable Court as to call for affirmance without the necessity of further argument.

OPINIONS BELOW

The relevant orders and final judgment of the statutory three-judge district court are correctly set forth as attachments to appellants' Jurisdiction Statement.

QUESTIONS PRESENTED

1. Whether jurisdiction properly lies in this Honorable Court under 28 U.S.C. § 1253 and 28 U.S.C. § 2281.

2. Whether the decision of the three-judge district court below was supported by ample evidence and is so obviously correct under this Court's prior adjudications as to obviate the need for further argument, calling instead for summary affirmance by this Court.

3. Whether it is manifest that the questions upon which the decision in the cause depends are so unsubstantial as not to warrant further argument, but to instead call for this Court's disposition by the grant of appellees' motions to affirm.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Since this litigation stems from the reflection of ever changing racial *residential* patterns *in public education*, it is perhaps well to start with some brief observations on what the demographic situation is in the counties and cities involved in this case. In looking at the Atlanta metropolitan area one finds much that is similar, but also certain things dissimilar, to what is seen in American cities generally (i.e. where both substantial black and substantial white populations are present). Perhaps unlike many other cities, there is at present a considerable degree of "spotted integration" in the Atlanta area, with individual black families having purchased homes in recent years in many predominantly white suburban subdivisions. Moreover, there are old established black communities in all of the defendant counties and cities, these communities lying at all points of the compass (and at varying distances) from downtown Atlanta. As appellants' principal expert witness, Dr. Karl Taeuber, conceded, black citizens had "greater access to the suburbs," and in fact resided in greater numbers in the suburbs in the Atlanta area than in various northern cities (such as Detroit) with which he was familiar, and where, he testified, many suburban areas had virtually no black residents whatsoever. Tr. Vol. III, pp. 40, 49 (Taeuber). Dr. Taeuber knew of no legal barriers, past or present, to *interdistrict* migration in the six county area, and admitted that black migration has gone on both to and from Atlanta and the surrounding counties, with enormous increases over the past few years, for example, in the black population of suburban and still predominantly white DeKalb County. Tr. Vol. III, pp. 49-63 (Taeuber).

On the other hand, it cannot be gainsaid that as in seemingly all other large urban areas of our Nation, pronounced ethnic or racial residential patterns do exist. While racially identifiable black neighborhoods have existed in the City of Atlanta since at least the turn of the century, an enormous black in-migration began following World War II which caused these neighborhoods to expand rapidly and massively. Adjoining white neighborhoods became "transitional" (i.e. temporarily integrated) and then "all black". While black citizens were flowing into Atlanta from rural areas (including from farms located in the adjoining counties named as defendants in this litigation), its white citizens, in the 60's and 70's, joined the nationwide suburban movement in increasing numbers. As a result, the white population of the City of Atlanta, which constituted around 65% of the whole from 1940 to 1960, and which was still over half of the City's total population in 1970, had decreased to 40% by 1977 (according to Atlanta Regional Commission estimates). In looking at these percentages, the current situation in Atlanta, it should be noted, is *not* one of a run down black core or central city (or ghetto) surrounded or contained by an affluent "white collar". Black residential concentrations flow outward from central Atlanta towards the east and southwest, growing into adjoining counties complete with "suburban sprawl" and subdivisions in all price ranges. All of this is remarkably like the flow of white residential concentration outwards (and into adjoining counties) in a northerly direction from Atlanta, except that the counterpart of the "spotted integration" in the predominantly white communities is less common in the black communities.

It is this social mobility which has brought about the

demographic patterns of which plaintiffs (now appellants)[4] complain. The result of black citizens moving into the City of Atlanta in large numbers during the 50's and 60's (frequently from farms in nearby counties), and of large numbers of white citizens leaving the city for the same, now "suburbanized" counties (sometimes for subdivisions erected on the very farmlands from whence black citizens had departed) has been a sharp change in racial composition of the City of Atlanta *and its schools*. The city's public schools, once predominantly white, are now 89% black.

Plaintiffs filed their original complaint on June 7, 1972, naming as defendants the State Superintendent of Schools and State Board of Education of the State of Georgia, as well as five counties (Fulton, DeKalb, Cobb, Clayton and Gwinnett) and four cities (Atlanta, Decatur, Marietta and Buford) through their respective superintendents and boards of education. A sixth county (Douglas) was subsequently added as a defendant through its elected school board and superintendent. Contending that the State and its counties and cities were responsible for variances in the racial composition of the differing counties and cities, appellants asserted that county and city boundary lines were "obstacles to desegregation of the public schools in the multi-county-city metropolitan area" and should be "altered or disregarded." Original Complaint, par. 13. It was prayed that the court require defendants to bring about the full consolidation or merger of the 10 defendant county and city school systems into a single metropolitan school system. Original Complaint, pp. 9-10.

Needless to say, the order prayed for by plaintiffs would

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[4] For linguistic ease the appellants will in most instances in this brief be referred to simply as "plaintiffs."

have absolutely mandated injunctive relief restraining the enforcement not merely of a few state statutes, but of the entire State constitutional and legislative framework providing for the governance and control of public education (including the power to tax and spend, issue bonds, eminent domain, etc.) by county and in some instances city government. Mindful of *Spencer v. Kugler*, 326 F.Supp. 1235 (D. N.J. 1971) [three-judge district court], *aff'd.*, 404 U.S. 1027 (1972), where virtually identical issues had been raised (albeit on a less Gargantuan scale), and of *Turner v. Fouche*, 396 U.S. 346, 353 n.10 (1970), the State defendants, along with a number of the local county and city defendants, moved for the convening of a three-judge district county pursuant to 28 U.S.C § 2281. Chief Judge John R. Brown of the United States Court of Appeals for the Fifth Circuit entered an order constituting a three-judge district court on August 14, 1972. The action continued as a three-judge court case when plaintiffs filed their "Amended and Substituted Complaint" complaint on September 30, 1975.

The "Amended and Substituted Complaint" followed this Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), its purpose being to track the language of this Court as to the sort of extraordinary circumstances which might, if demonstrated, permit local school district boundary lines (in *that* case the school boundary lines of small sub-county school districts, some 86 existing within the three county metropolitan Detroit area) to be discarded in favor of an interdistrict remedy.

In their "Amended and Substituted Complaint", plaintiffs, while eliminating their former use of the word "consolidation", continued to demand the same thing using differing words. They continued to ask the three-judge

district court for "an inter-system plan of desegregation" which was to be "without the limitation of political boundary lines", (boundary lines *sine qua non* to the existence of county and city government in the exercise of eminent domain, bond issues, taxation and school operation and management, and quite obviously boundary lines created and maintained by express state constitutional provisions and statutes). While by no means referring to all of the constitutional provisions and statutes whose operation would have to be enjoined were such relief to be granted, plaintiffs asserted that the failure to provide a "federation structure" (the term now used in place of "consolidation") deprived them of "equal protection of the laws" in violation of the Fourteenth Amendment (Amended and Substituted Complaint, pp. 37-38). They demanded that the district court declare unconstitutional and "enjoin the future enforcement of" a number of *expressly designated* State constitutional provisions and statutes pertaining to county and city governance, management and control of public education "to the extent that they confine control and management of public schools within counties to a County Board of Education". (Amended and Substituted Complaint, p. 38).

Following prolonged and massive discovery by both sides, the three-judge district court determined that a bifurcated trial was advisable. During the liability phase, following plaintiffs' case (which was presented in November 1977), seven of the defendants, which might generally be described as outlying counties and cities,[5] filed motions to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure. The district court found that all of the seven defendants filing motions to dismiss were "unitary or

[5] The counties of Gwinntte, Cobb, Clayton and Douglas and the cities of Buford, Marietta and Decatur.

under court jurisdiction" when plaintiffs' suit was filed. It further found that the absence of any *current* violation, or even of any significant violation *of recent vintage*, had attenuated plaintiffs' "historical" evidence (extending backwards for over fifty years). Such evidence in fact but told the three judges what they and everyone else already knew (and which the court judicially noticed), namely that a condition of racial segregation once upon a time permeated all aspects of life in Georgia—including public education. In its order, entered on March 2, 1978, the three-judge district court concluded that plaintiffs had failed to prove their case against the seven movants because of the failure of plaintiffs to show evidence of substantial constitutional violations having an interdistrict impact. The motions to dismiss were granted.

The remaining defendants[6] presented their case later during that same month (March 1978). A number of expert witnesses were presented by both sides and testified at length on demographic patterns and other matters. The three-judge court concluded that the weight of the evidence demonstrated that existing demographic patterns have resulted from economics, choice and spatial factors (e.g. rivers, railroads, industrial areas, etc.) and *not* from present or past governmental discrimination. It further noted that plaintiffs offered no convincing evidence of any concert of action, or tacit or express undertaking on the part of the defendants, to concentrate black citizens within the City of Atlanta while holding down black growth in suburban areas (the thrust of long ended governmental discrimination in Atlanta having been to the contrary a history of unsuccessful attempts to *exclude* black immigration and contain the growth of black com-

[6] The State defendants, Fulton and DeKalb Counties, and the City of Atlanta.

munities). The court concluded that the evidence demonstrated a lack of, rather than the presence of, the substantial interdistrict violation which this Court said in *Milliken* was *sine qua non* to the award of interdistrict relief. Final judgment in favor of the defendants was entered on September 24, 1979.[7] Plaintiffs filed a Notice of Appeal to this Honorable Court on October 22, 1979, their Jurisdictional Statement being filed on or about February 19, 1980, following the grant of a 60 day extension at plaintiffs' request.

PART II

ARGUMENT

1. This action was properly adjudicated by a three-judge district court under 28 U.S.C. § 2281, and appellate jurisdiction lies in this Honorable Court by virtue of 28 U.S.C. § 1253.

In their Jurisdictional Statement, plaintiffs (now appellants) refer to court below's characterization of the three-judge court jurisdiction over the case (pursuant to 28 U.S.C. § 2281) as "unclear." *See* Jurisdictional Statement, p. 3. This, by virtue of what is omitted, is misleading. What the three-judge district court was commenting upon in its use of the word "unclear" was the three-judge court situation as it existed *under the original complaint filed in 1972*, not any lack of clarity following the filing of plaintiffs' "Amended and Substituted Complaint" in 1975. The situation after filing of the substituted com-

[7] In order to protect plaintiffs in the event it should ultimately be determined that the action was not an appropriate matter for adjudication by the three-judge district court (plaintiffs had all along contested the propriety of convening the three-judge court), the originating judge adopted the opinion and order of the three-judge district court as that of the district court sitting as a single judge.

plaint in 1975 was referred to by the court quite differently:

> "It would seem that on its face the complaint involves a very real attack on various portions of the Georgia Constitution and statutes of the State of Georgia" (Order dated Sept. 30, 1977, p. 4).[8]

We think that some examination of both the original complaint and the amended and substituted complaint might be useful in connection with how the latter eliminated any conceivable question as to the necessity of convening the three-judge district court which decided the case.

(a) **The Original Complaint (1972)**

Looking at 28 U.S.C. § 2281, we find that it provides that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

While 28 U.S.C. § 2281 speaks in terms of restraining the operation or enforcement of State "statutes," it is

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[8] The repeal of 28 U.S.C. § 2281, effective August 12, 1976, Pub. L. 94-381, § 1, 90 Stat. 1119, has no application to this case. Section 7 of the repealing act states:

> "This Act shall not apply to any action commenced on or before the date of enactment."

Both the original complaint (1972), and the "Amended and Substituted Complaint" (1975), were filed prior to August 12, 1976, and the three-judge district court below correctly held that 28 U.S.C. § 2281 remained applicable to this action (Order entered Sept. 30, 1977). *See also Calabi v. Malloy*, 438 F.Supp. 1165, 1167n.4 (D. Vt. 1977).

well settled that it applies to state constitutional provisions as well. *See, A.F. of L. v. Watson,* 327 U.S. 582, 592-93 (1946); *Sincock v. Duffy,* 215 F.Supp. 169, 171-72 (D. Del. 1963) [3-judge district court], *aff'd., sub nom, Roman v. Sincock,* 377 U.S. 695 (1964). The policy, as stated by the Court in *Phillips v. United States,* 312 U.S. 246, 251 (1941), is as follows:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission'. *The crux of the business is procedural protection against an improvident statewide doom by a federal court of a state's legislative policy.* This was the aim of Congress and this is the reconciling principle of the cases." [Emphasis added.]

Under their original complaint (as indeed under their "Amended and Substituted Complaint") plaintiffs asked for relief which went far beyond the mere restraining of a "single" State statute or constitutional provision (which in and of itself would be sufficient to invoke the provisions of 28 U.S.C. § 2281). They called for the consolidation or merger of six counties and four cities with respect to their primary governmental activity, "public education", their future school operations to be "without the limitation of political boundary lines". Since the existing organization and operation of public education (along with related taxing and spending decisions, election of school officials, exercise of powers of eminent domain, issuance of bonds and similar matters) was established by and has been maintained pursuant to an entire panoply of State

constitutional provisions and statutes, it seemed to us to follow that this drastic restructuring of Georgia's local governmental organization obviously called for a three-judge district court, particularly in light of the similarity of the issues presented (i.e. under the original complaint) to *Spencer v. Kugler*, 326 F.Supp. 1235 (D. N.J. 1971) [3-judge district court], *aff'd.*, 404 U.S. 1027 (1972).

The sole uncertainty at the time was that notwithstanding the fact that a grant of the relief sought would run rough-shod over, and *factually* restrain the enforcement and operation of a substantial number of State constitutional provisions and statutes, plaintiffs correctly pointed out that in their complaint they had not, in so many words, *expressly* enumerated the constitutional provisions affected, or *expressly* prayed that the operation of the same be enjoined.

The question, as we saw it then and as we see it today, is whether 28 U.S.C. § 2281 is a matter of form or substance. It was our view then, as it is today, that it is substance and not form which controls, and that where the *actual effect* of the relief sought would be to enjoin the "enforcement, operation or execution of any State statute", it matters not whether the statute involved is or isn't expressly named and attacked in the complaint. This seems consistent with this Court's observation in *Phillips v. United States*, 312 U.S. 246, 251 (1941), that:

> "the crux of the business is procedural protection against an improvident statewide doom by a federal court of a state's legislative policy."

This result further seems compelled by the fact that the alternative would appear to be summary dismissal of the complaint. It is axiomatic that equity follows the law. E.g. *United States v. Smelser*, 87 F.2d 799, 801 (5th Cir.

1937); 27 Am. Jur. 2d *Equity* § 123. Courts do not grant equitable relief which is contrary to or not in accordance with law. As this Court said almost one hundred years ago in *Rees v. City of Watertown*, 19 Wall. (86 U.S.) 107, 122 (1874):

> "A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law or even without authority of law."

Legislative enactments have a presumption of validity. It follows that where as here a plaintiff seeks to restrain a governmental official from acting in a certain manner and that official shows that his actions were taken in accordance with a state constitutional provision or statute whose validity, not being attacked, is conceded, the action would be subject to dismissal. As this Court put it in *Ex Parte Bransford*, 310 U.S. 354, 361 (1940):

> "Where by an omission to attack the constitutionality of a state statute its validity is admitted for the purposes of the bill, a determination by the trial court that the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill."

In light of *Ex Parte Bransford* the situation with respect to the original complaint as we see it, in other words, was that the case was either a three-judge case or it was no case at all.

(b) **The "Amended and Substituted Complaint" (1975)**

Whatever uncertainty may conceivably have existed on the three-judge court issue under plaintiffs' original complaint (and for the reasons just stated we think that even there three-judge court jurisdiction was present), it seems

obvious that under the "Amended and Substituted Complaint" all doubt has been eliminated. That amendment placed the case at the very center of three-judge court jurisdiction under 22 U.S.C. § 2281. Whether labeled "consolidation," "federation" or anything else, the demand for the restructuring of local government and the creation of a Gargantuan unitary school system covering 1,925 square miles and including over 300,000 pupils would, for the reasons already stated, have continued to require the factual restraining of the operation and enforcement of the constitutional provisions and laws pursuant to which the county and city defendants' schools are presently organized and functioning.

Constitutional provisions and statutes whose operation and enforcement would *of necessity* have to be restrained include, *but are not at all limited to:* Article VIII, Section V, Paragraphs II, V and VI, and Article VIII, Section VII, Paragraph I of the Constitution of the State of Georgia of 1976, and Ga. Code Ann. §§ 32-901, 32-902, 32-902.1, 32-903, 32-905, 32-909, 32-910, 32-912, 32-915, 32-921, 32-927, 32-932, 32-933, 32-934, 32-951, 32-953, 32-954, 32-1002, 32-1004, 32-1008, Code Chapt. 32-11, Code Chapt. 32-14.

While plaintiffs understandably made no compilation in either their original or in their "Amended and Substituted Complaint" of these and other constitutional provisions whose enforcement would have to be restrained in order to grant the relief sought, they nonetheless did, in their "Amended and Substituted Complaint" expressly ask the three-judge district court to declare unconstitutional and "enjoin the future enforcement of", the following:

(1) Article VIII, Section V of the Constitution of the

State of Georgia of 1945 (Ga. Code Ann. § 2-6801) [now Article VIII, Section V, Paragraph II of the Constitution of the State of Georgia of 1976; Ga. Code Ann. § 2-5302];

(2) Article VIII, Section VII of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. § 2-7001) [now Article VIII, Section V, Paragraph VI of the Constitution of the State of Georgia 1976; Ga. Code Ann. § 2-5306]; and

(3) Ga. Code Ann. § 32-901.

All of these provisions of State law deal with the establishment of county and city school systems and the confining of the same to the governance, management and control of their respective boards of education. Additionally, plaintiffs sought in the prayer of their "Amended and Substituted Complaint", to enjoin the enforcement or maintenance of the school system boundary lines provided for in these constitutional provisions and statutes, and to require defendants to pay for an army of "urban planners, educators, sociologists, psychologists, systems engineers, architects and other professionals" in order to develop "a comprehensive plan for *a metropolitan school district*" (if not a single *consolidated* school district, what?).

Whatever gray areas may have existed under the original complaint with respect to "the outer reaches" of 28 U.S.C. § 2281, have nothing to do with the case at bar, as it exists under the "Amended and Substituted Complaint". It involves *the very core area* of the "procedural protection against an improvident statewide doom by a federal court of a state's legislative policy". *Phillips v. United States*, 312 U.S. 246, 251 (1941). Plaintiffs asked for an order restraining the enforcement of State constitutional provisions and statutes on the ground that as

applied these statutes unconstitutionally deprived them of what is claimed to be "equal protection". This is what 28 U.S.C. § 2281 was (and for the purposes of this case is) all about. *See Spencer v. Kugler*, 326 F.Supp. 1235 (D. N.J. 1971), *aff'd.*, 404 U.S. 1027 (1972); *Turner v. Fouche*, 396 U.S. 346, 353 n.10 (1970).

Appellants' reliance on *Costello v. Wainright*, 430 U.S. 325 (1977), in opposing three-judge court jurisdiction, is singularly misplaced. It need but be pointed out that that decision:

(a) involved a complaint which on its face didn't involve any challenge to state statutes, and where there was, when the case started, no reason at all to suspect that a three-judge district court should have been convened to hear the case, 430 U.S. at 326, and

(b) involved at most a possible *"temporary suspension"* of an otherwise valid state statute to effectuate federally mandated relief. *Ibid.*

Unlike *Costello*, in the instant case it was recognized by appellees (and by the originating judge and the three-judge district court), from the very outset, that plaintiffs' action involved a direct challenge to the entire State constitutional and legislative foundation for the organization and operation of public education as a function (indeed the most important function) of local county and city government. Unlike *Costello*, a timely motion to convene a three-judge court was filed. Unlike *Costello*, a three-judge district court was in fact convened to adjudicate, and did adjudicate, the case.

Secondly, plaintiffs attempt to achieve a joint operation

(be it called "consolidation" as in the original complaint, or "federation" as in the amended complaint) "without the limitation of political boundary lines", obviously involves more than the "*temporary* suspension" of a state statute involved in *Costello*. The amended complaint shows on its face that plaintiffs seek, *inter alia*, to have constitutional and statutory provisions providing for the existing operation of school systems by counties and by cities declared unconstitutional, with their future enforcement enjoined. As the three-judge district court put it in its order of September 30, 1977:

> "It would seem that on its face the complaint involves a very real attack on various portions of the Georgia Constitution and statutes of the state of Georgia" [the three-judge court noting that in *Costello* no identifiable rule or regulation had been challenged on its face].

Nor, of course, is the instant action one where a state statute is attacked on the basis that it has been superseded by some federal statute under the "Supremacy Clause" of the Constitution, e.g. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). That case expressly contrasted the "supremacy clause" situation, where a three-judge district court is *not* required, with "the traditional Due Process Clause, Equal Protection Clause, Commerce Clause, or Contract Clause arguments", where (as in the case at bar) a three-judge court is required. 382 U.S. at p. 120.

Finally, appellants' attempt to cloud the issue by beating a dead horse (pointing out that in addition to attacking constitutional provisions providing for the organization and operation of public education as a function of county and city government, they *also* attack a no longer extant State constitutional provision which once upon a

time provided for separate education of black and white students), is at best an ineffectual attempt at diversion. The defunct constitutional provision, a dead letter for many years before the instant action was filed, was formally stricken from the State Constitution in 1976. No one suggests that an attack limited to this palpably unconstitutional *former* provision, if it were in fact still operative, would require a three-judge court. Its former existence simply has no relevance to those other constitutional provisions and statutes which relate to county and city control and operation of public education in Georgia, which appellants *also* ask to have stricken.

We respectfully submit that the instant action is, and from its incipiency has been, at the very heart of what 28 U.S.C. § 2281 is all about. We further submit, however, that even if it could have been seriously thought, *prior* to the filing of plaintiffs' "Amended and Substituted Complaint", that form prevailed over substance, and that the failure to *expressly* ask that the operation of expressly designated statutes be restrained precluded the application of 28 U.S.C. § 2281, no substantial question exists as to the applicability of the statute subsequent to the filing of the amended complaint (which did expressly seek to declare unconstitutional and enjoin the operation of expressly designated constitutional provisions and statutes). This Honorable Court's jurisdiction under 28 U.S.C. § 1253 is, we submit, obvious.

2. The decision of the three-judge district court below is more than amply supported by the evidence presented, and is so obviously correct in light of this Court's prior adjudications as to call for affirmance without the necessity of further argument.

This Court has consistently held that States have the right to maintain political subdivisions of government

(i.e. counties and cities) and that the resulting diversities (which obviously can and will include differences in ethnic or racial composition as well as of wealth and views on the proper ordering of governmental priorities) do not offend the "equal protection" clause of the Fourteenth Amendment. *See Missouri v. Lewis*, 101 U.S. 22, 30-32 (1879); *Salsburg v. Maryland*, 346 U.S. 545, 550-553 (1954); *McGowan v. Maryland*, 366 U.S. 420, 427 (1961). The Court has applied this rationale directly to the field of public education. *See*, e.g. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42-44 (1973). It was said by the Court in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972), that:

> "Direct control of decisions vitally affecting the education of one's children is a need that is strongly felt in our society. . . ." (407 U.S. at p. 469),

with Chief Justice Burger, along with Justices Blackman, Powell and Rehnquist similarly opining that:

> "Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." (407 U.S. at p. 478).

Similarly, in *Spencer v. Kugler*, 326 F.Supp. 1235, 1240-1241, (D. N.J. 1971) [3-judge district court], *aff'd.*, 404 U.S. 1027 (1972), it was observed that:

> "It cannot be said that school district lines based on municipal boundaries are unreasonable."
>
> "Racially balanced municipalities are beyond the pale of either judicial or legislative intervention."

In what we believe (as the three-judge district court below believed) to be the lodestar in cases of this genre, namely *Milliken v. Bradley*, 418 U.S. 717, 744-745 (1974), this Court referred to the extraordinary circumstances

which would have to be shown to permit even "sub-county" school district lines to be disregarded, in the following language:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of *inter-district* segregation." (emphasis added).
>
> ". . . without an *interdistrict* violation and *interdistrict* effect, there is no constitutional wrong calling for an interdistrict remedy." (emphasis added).

By way of illustrating the sort of interdistrict violations which it thought might justify the grant of interdistrict relief, the Court referred to:

(1) The drawing or alteration of school district lines on a racial basis.

(2) The carving out of new school districts on a racial basis, and

(3) Arrangements whereby children residing in one school district attend school in another school district for purposes of, or where the practical effect is, increased racial segregation,[9]

with Mr. Justice Stewart, in his concurring opinion, adding:

(4) Interdistrict segregation caused by purposeful, or racially discriminatory use of state housing or zoning laws.[10]

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[9] 418 U.S. at pp. 744-748.
[10] 418 U.S. at p. 755.

The three-judge district court below correctly concluded that for all of plaintiffs' evidence of racially discriminatory actions, conduct and policies of governmental offitials *in the distant past*, plaintiffs had failed to prove, while defendants' evidence affirmatively disproved, that such long ended violations (which in almost all instances were even at the time they occurred violations *within* a given county or city as opposed to interdistrict violations) had any substantial residual impact upon *today's* racial residential patterns. The weight of the evidence supported, and we would respectfully say demanded, that the court below decided as it did. Among other things, under each of exceptional circumstances which this Court enumerated in *Milliken* as a possible basis for disregarding political boundaries of school districts (with plaintiffs' burden of proof, we submit, being even higher where as here the boundaries in question are county and city lines rather than smaller sub-county and city units), the evidence in fact demonstrated the opposite of what plaintiffs contended.

(a) **The drawing or alteration of school district lines on a racial basis.**

As to county boundary lines, the uncontroverted evidence showed that with but two exceptions there have been no changes or alterations at all this century. The two changes which have taken place both involved Fulton County, occurring in 1929 and 1931. Plaintiffs neither alleged nor introduced evidence to hint at any racial motivation or impact as to these alterations fifty years ago.

While the municipal defendants in this action have upon occasion expanded their city limits through annexation, the evidence pertaining to such annexations demonstrated that the net effect with respect to the City of

Atlanta (where plaintiffs reside) has been to bring more white than black pupils into its corporate (and hence school system) limits. Insofar as Atlanta's schools are concerned, in other words, the impact of annexation was "integrative" not "segregative." Plaintiffs' own witnesses substantiated this. Tr. Vol. III, pp. 55-56 (Taeuber).

Certainly there was no room for any finding of an inter-district violation based upon evidence of the drawing or altering of county or city boundary lines on a racial basis.

(b) **The carving out of new school districts on a racial basis.**

Suffice it to say that no new school districts have been shown by the evidence to have been "carved out" or created in the six county area *on any basis* (i.e. racial or otherwise). Such a "carve out" or creation of a new splinter school district is in fact precluded by the Constitution and laws of Georgia which make public education a *county* function, and while permitting existing city school systems to continue, prohibit the creation of any new city school system.

(c) **Arrangements whereby children residing in one school district attend schools in another school district for purposes of, or where the practical effect is, increased racial segregation.**

Statistical evidence on non-resident school attedance in the 10 counties and cities involved in this litigation showed that something less than 1/10 of 1% of the pupils in the area were attending public schools other than in the county or city within which they resided. Plaintiffs submitted no evidence to show that these small numbers of nonresident pupils were attending school outside their county or city of residence for racial "purposes", and at such level the practical effect is in any event *de minimis*

(such nonresident pupils in fact consist of both black and white students).

While interdistrict cooperation exists regarding the students of one school system utilizing facilities of other systems (e.g. visits to the Fernbank Science Center in DeKalb County, jointly operated facilities for certain categories of handicapped children, joint purchasing, and the joint use of psychiatrists and consultants), plaintiffs submitted no evidence to indicate that these special programs or cooperative arrangements for handicapped children are being carried out in a racially discriminatory manner. The evidence of defendants that these programs are not conducted on a racial basis in any manner whatsoever was indeed wholly uncontroverted by plaintiffs.

What plaintiffs did focus upon in connection with their evidence about "arrangements" whereby children residing in one county attended school in another on a racial basis, was (as it was in most other aspects of their evidentiary presentation) events of the distant past. Historically, at a time when racial segregation was the law of the State if not of the Nation, some school systems, as Cobb County and Marietta, had contracts which required small numbers of black students to go to the city for their high school education. In the Cobb-Marietta situation the former, having fewer than 70 black high school students, contracted to have them educated in Marietta. The *purpose* of the contract *per se* was not segregatory (no options were available on this point since segregation was then commanded by state law) but to provide a better education, i.e. a larger black high school in Marietta as opposed to a smaller, less well equipped black high school in Cobb County. Nor did it in fact have the "practical effect" of increased racial segregation. Racial

segregation in public education was at the time absolute under State law and hence couldn't be "increased". Of course, all of this has long been academic. Plaintiffs admitted that the Cobb-Marietta Contract ended not later than 1966. Plaintiffs introduced not a scintilla of evidence to show that this contract had any racial impact anywhere which did not end with the contract itself.[11]

(d) Interdistrict segregation caused by purposeful racially discriminatory use of state housing or zoning laws.

Because the entire area is composed of so many uncertainties and speculative views, plaintiffs not surprisingly concentrated the bulk of their evidentiary efforts on a claimed continuing impact of housing, zoning and residence related discrimination of the past. But here too, plaintiffs' evidence not only failed in and of itself, but was outweighed by defendants contrary evidence. This can be seen by looking at the specifics of the historical evidence plaintiffs relied upon.

(i) Buffer Zones, Green Belts, Racial Zoning and other unsuccessful "containment" attempts.

One of the more massive aspects of plaintiffs' evidence is its painstakingly detailed recital of the use of buffer zones, green belts, racial zoning in the attempt to limit and contain the expansion of black residential areas *within the City of Atlanta*. Perhaps the principal difficulty with plaintiffs reliance upon these unquestionably unconstitutional acts of racial discrimination long ago, is the fact that all such attempts were total failures. As their own

[11] Actually, no evidence was tendered by plaintiffs to show any impact of the contract upon Atlanta, or anywhere else other than Cobb County and Marietta, even at the time it did exist. It *never was*, in other words, an interdistrict violation *involving or affecting Atlanta*, where plaintiffs reside.

witnesses stated, these barriers simply didn't work, with the expanding black community simply moving around or through the same. Dep. Q. V. Williamson, pp. 88-89. Moreover, all such racially discriminatory practices, again from plaintiffs' own witnesses, had ended by 1966, dep. Q. V. Williamson, p. 89, and by far the greater portion of the huge population shifts leading to the racial imbalance of which plaintiffs complain *occurred after these discriminatory practices had ended.* It may further be noted that these violations, even when they existed, were of an *intradistrict* not interdistrict nature.

Not only was no evidence introduced of any racial barriers having ever existed to stop movement across county or city lines (as opposed to movement from one neighborhood to another *within* the same city or county), but governmental officials in Atlanta are obviously not empowered to enact zoning regulations or create "green belts" beyond the city limits. Additionally, these unlawful "containment" attempts of city officials in the past is inconsistent with the picture plaintiffs attempt to paint of a plot to concentrate black citizens *in* Atlanta and keep them from moving to the suburbs. Had these improper intracity racial barriers and containment attempts worked, their impact would have been to *prevent* the racial concentrations in Atlanta about which plaintiffs complain—*not* to bring them about.

(ii) **Public Housing.**

Plaintiffs' evidence of larger numbers of public housing units being constructed in Atlanta than in the surrounding counties (in conjunction with the fact that Atlanta's public housing is about 90% black) also demonstrates little if anything in the way of a substantial *interdistrict* violation. Public housing exists in all of the defendant

counties and cities. The evidence demonstrates that public housing largely mirrors the racial composition of the surrounding area. In Cobb County it was 83% white, while in the City of Decatur it was 99% black. The evidence further showed that black citizens living in the central city areas of Atlanta had a pronounced disinterest in moving into public housing outside the central city. New projects outside this area could not fill vacancies notwithstanding the existence of a substantial waiting list for public housing in Atlanta generally.

Finally, even if Atlanta's public housing (and its occupants) were to be plucked up by a giant crane and relocated throughout the six county area, the evidence shows that the racial impact of the relocation of these units would be negligible, not producing any substantial alteration of the existing racial composition of Atlanta or any of the other defendant counties and cities.

In general, defendants' evidence established that existing residential patterns in the Atlanta area are caused by myriad circumstances of personal choice, economics and spatial factors, and that the impact of any past acts or policies of governmental discrimination upon today's inter-county or city variations of racial composition is negligible if it indeed exists at all. Plaintiffs' own expert witness, Dr. Karl Taeuber, while he believed that "racial discrimination" (private and public lumped together) was a factor along with personal choice and economics, could not say or estimate whether such discrimination was 10% or 90% responsible. Tr. Vol. III, p. 66. This inability to quantify would itself seem fatal to plaintiffs' case under *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977). Defendants, on the other hand, produced strong evidence to the effect that the forces which caused existing demographic patterns were non-governmental. Dr.

Anthony Pascal, Director of Human Resources Study at the Rand Corporation, and a White House advisor on the development of American Urban Policy, testified that based on his studies, existing levels of residential segregation in the Atlanta area could be attributed to socio-economic factors alone (i.e. even ignoring the factor of personal choice). Dr. David J. Armor, a senior social scientist at the Rand Corporation, testified that based upon his studies of opinion surveys in the Atlanta area, about 90% of the existing racial residential segregation could be attributed to the interaction of black and white preferences—both of which favored "integrated" neighborhoods but only in terms of a neighborhood predominantly of their own race (thus making a stable integrated neighborhood unlikely). Dr. William A. Clark, a professor of geography at U.C.L.A., found in his study of the Atlanta situation that the course of expansion of black communities in Atlanta had been as would have been expected in view of existing spatial factors (e.g. railroads, industrial and commercial areas). He testified that he found nothing to indicate that the patterns of black expansion which have occurred had been altered in any manner by governmental action (such as zoning, the location of public housing or past racial barriers). He pointed to the increasing black population in outlying counties, with a rather dramatic migration into predominantly white DeKalb and Fulton Counties. All of this positively disproved plaintiffs' theory that black citizens have been confined to or prevented from moving out of the City of Atlanta (the presumed "interdistrict" violation asserted by plaintiffs).

3. The questions upon which the decision of the cause depends are so unsubstantial as not to warrant further argument.

The legal standards by which this case was decided by the three-judge district court below are those enunciated by this Honorable Court in *Milliken v. Bradley*, 418 U.S. 717 (1974). Plaintiffs' appeal to this Court is not based upon any questioning of these legal standards *per se*, or upon their use or nonuse by the district court, but instead is predicated upon plaintiffs' view of the weight of the evidence. For the reasons already set forth, we believe that the weight of the evidence not only authorizes but indeed mandates the decision reached by the court below. While plaintiffs have pointed to a vast number of intra-district "violations" in the distant past (obviously we cannot rewrite History), plaintiffs own evidence failed to show *any current inter or intra district violation*, and further failed to prove *any current interdistrict impact of any past inter or intra district violation*. We would submit that since this sole legal question (sufficiency of the evidence) is wholly unsubstantial, this Court's plenary review with additional argument and analysis is unwarranted.

CONCLUSION

For the reasons stated we respectfully submit that the decision below was amply supported by the evidence, is plainly correct, and ought to be affirmed without the necessity of further argument.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

EMMA ARMOUR, et al., APPELLANTS

v.

JACK P. NIX, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether this Court has jurisdiction of the appeal from the judgment entered by the three-judge court.

2. Whether the evidence establishes interdistrict violations with significant interdistrict effects.

INTEREST OF THE UNITED STATES

Because of its responsibility for federal litigation, the United States has a substantial interest in the efficient operation of the judicial system. That interest is implicated in the three-judge court issue presented in this case. Three-judge courts impose a heavy burden on limited judicial resources, not only at the district court level, but also in this Court, through the operation of the direct review provision (28 U.S.C. 1253). Moreover, as is true in many school desegregation cases, this case involves complex factual determinations concerning the intent of governmental officials and the effects of their actions over an extended period of time. Such cases are particularly illsuited for direct review by this Court. We are led to participate at this stage because, in our view, the appellants have not fully explored the jurisdictional problems presented by this case.

In addition, the United States has substantial enforcement responsibility with respect to school desegregation under Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701, et seq. The Court's resolution of the issues presented in this case would affect that enforcement responsibility. The United States has participated either as a party or as amicus curiae in most of the Court's school desegregation cases, including Brown v. Board of Education, 347 U.S. 483 (1954), 349 U.S. 294 (1955); Cooper v. Aaron, 358 U.S. 1 (1958); Green v. County School Board, 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); School Board of City of Richmond v. State Board of Education, 412 U.S. 92 (1973); Keyes v. School District No. 1, 413 U.S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Runyon v. McCrary, 427 U.S. 160 (1976); Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 433 U.S. 267 (1977); Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977); Columbus Board of Education v. Penick, No. 78-610 (July 2, 1979); Dayton Board of Education v. Brinkman, No. 78-627 (July 2, 1979); and Estes v. Metropolitan Branches of Dallas NAACP, No. 78-253 (Jan. 21, 1980).

STATEMENT

This school desegregation suit involves the Atlanta metropolitan area. The suit was filed in 1972 as a class action by parents of black children attending public schools in the Atlanta metropolitan area (J.S. App. C 1). The defendants are the Atlanta Board of Education, the State Board of Education, and six county and three city boards of education in the metropolitan area (ibid.).

The amended and substituted complaint, filed in 1975, alleged that the Atlanta school system was 86% black, and that defendants and other state officials had committed interdistrict violations that substantially contributed to the high concentration of metropolitan area minority students in that system (J.S. App. K 15, 37). The complaint sought an interdistrict plan of desegregation, and requested the court to enjoin certain state statutes and constitutional provisions confining control of education to independent school districts to the extent that they might impede such a remedy (J.S. App. K 37-39).

On August 24, 1973, a three-judge court was convened. Because that court was uncertain whether the case required three judges, it directed the case to proceed simultaneously before a single judge and a three-judge panel (J.S. App. A 2).

Almost four years later, appellants moved to dissolve the three-judge court in light of intervening decisions of this Court. On September 30, 1977, the court denied the motion (J.S. App. B). The court pointed out that in the cases relied upon by appellants "no identifiable rule or regulation had been challenged on its face" (J.S. B 5). In contrast, the court stated, the appellants' "complaint in the instant case challenges the constitutionality of state statutes and constitutional provisions of the state of Georgia" (ibid.).

The case proceeded to trial on the issue of liability. At the close of appellants' evidence, several of the local school districts moved to dismiss the action against them. On March 2, 1978, the three-judge court granted their motions (J.S. App. C).

In March 1978, the remaining local school districts and the state board of education presented their evidence and in April 1978, appellants presented rebuttal. On September 24, 1979, the court issued an order finding that appellants had failed to prove the

liability of the remaining defendants and dismissing the case (J.S. App. D).[1] In this decision, the court made detailed findings of fact showing a history of widespread constitutional violations by governmental officials at all levels and a current condition of extreme disparity between the racial composition of schools in Atlanta and those in the suburbs.[2] Nevertheless, the court found no basis for an interdistrict remedy. The appellants filed notices of appeal from the district court's final judgment to both the Fifth Circuit and to this Court.[3]

DISCUSSION

1. This case raises important questions concerning the availability of interdistrict relief to remedy extreme disparities between the racial composition of schools in city school districts and those in the suburbs, when these disparities have been caused, at least in substantial part, by a history of unconstitutional state action. We agree with appellants, however, that this Court lacks jurisdiction of their appeal. This Court should accordingly dismiss the appeal, so that proceedings in the Fifth Circuit may resume as expeditiously as possible.

Appellants filed their protective notice of appeal under 28 U.S.C. 1253. This Court thus lacks jurisdiction unless this case was "required * * * to be heard" by a three-judge court and that court issued an order "denying * * * an * * * injunction."

1/ The decision was issued by the three-judge court and adopted by the single judge (J.S. App. D).

2/ These findings are summarized in the Jurisdictional Statement (pages 17-25). The findings amply support the court's conclusion that "historically * * * government officials at all levels contributed to the separation of the races in education" (J.S. App. D 2).

3/ The court of appeals has stayed all proceedings pending this Court's resolution of the jurisdictional issue.

Because this case was not required to be heard by a three-judge court and that court did not deny an injunction within the meaning of Section 1253, an appeal from the court's final judgment properly lies only in the court of appeals.

a. The three-judge court was convened pursuant to 28 U.S.C. (1964 ed.) 2281. Before its repeal, Section 2281 required the convening of a three-judge court whenever plaintiffs sought to enjoin the enforcement of a state statute on constitutional grounds. As the district court noted (J.S. B 3-4), the complaint in this action did seek to enjoin the enforcement of certain state statutes and constitutional provisions delegating control over education to local school districts to the extent that they might interfere with a remedy for proven interdistrict violations. [4/] But we agree with appellants that this request did not require the convening of a three-judge court.

Appellants have never challenged the state's policy of delegating control over education to independent school districts. [5/] Instead, appellants contend simply that state officials have engaged in unconstitutional practices that have resulted in a high degree of disparity between the racial composition of schools in the Atlanta

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4/ The constitutional and statutory provisions involved are Georgia Constitution, Article VIII, Section V, Chapter 2-6801; Georgia Code § 32-901 (1976); and Georgia Constitution, Article VIII, Section VII, Chapter 2-7001 (1945). The effect of these provisions is to confine control and management of public schools to county boards of education and municipal corporations. It is unclear whether these provisions would have to be enjoined to effectuate interdistrict relief.

5/ Appellants did challenge the constitutionality of the state constitutional provision providing for racially separate schools (Ga. Const. Art VIII Section I (1945)) and of the state statutory provisions prohibiting requiring students to attend, or teachers to teach at, certain schools on account of race (Ga. Code §§ 32-847 and 32-848 (1976)). In light of Brown v. Board of Education, 347 U.S. 483 (1954) and North Carolina Board of Education v. Swann, 402 U.S. 43 (1971), these constitutional and statutory provisions are so patently unconstitutional that a single, rather than a three-judge, court may invalidate them. Goosby v. Osser, 409 U.S. 512, 518 (1972); Bailey v. Patterson, 369 U.S. 31 (1962).

School District and those in the outlying suburban districts. The appellants sought to enjoin enforcement of the concededly constitutional legislative scheme establishing local control over education only to the limited extent that it might stand in the way of an effective remedy for this unconstitutional administrative behavior. This sort of incidental effect on a state's legislative policy does not trigger the need for a three-judge court. Costello v. Wainwright, 430 U.S. 325, 326 (1977).

In Costello, the lower court found unconstitutional overcrowding of prison inmates and ordered state officials to reduce the overcrowding. Id. at 325. The court of appeals held that only a three-judge court could issue such relief, because the court's order might require state officials to violate their statutory duty to accept custody of all prisoners. Id. at 326. This Court disagreed, holding that the "suspension of an otherwise valid state statute to effectuate federally mandated relief" does not require a three-judge order. Ibid.

The district court thought Costello distinguishable because there no challenge to any statute appeared on the face of the complaint. Although this Court noted in Costello that the complaint did not challenge any state statute, the decisive factor was the incidental nature of the effect on the state statute. The Court specifically explained that "[t]he applicability of § 2281 as written turns on whether a state statute is alleged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes." 430 U.S. at 326.

This Court's distinction between a challenge to a statute only insofar as it may be an impediment to relief and a challenge

to a statute as a source of the evil is grounded on practical considerations. A three-judge court should be convened only if it is clear at the outset that the court will have to pass on the constitutionality of a state statute. When a statute is not challenged as the source of the evil, but only as a possible impediment to relief, this threshold determination cannot be made. The approach followed by the district court, which looks only to the face of the complaint and draws no distinction between substantive and remedial challenges, would require a three-judge court to be convened and to receive all the evidence even if it should ultimately be determined that there is no need to rule on the constitutionality of the state statute. "Section 2281 embodies no such wasteful and uncertain mandate." Costello, supra, 430 U.S. at 326.

This case is a cogent example of that wastefulness. Because the district court ultimately concluded that appellants had not established their claim of unlawful interdistrict segregation, it never reached the question whether the state statutory scheme could constitutionally stand in the way of the grant of appropriate relief.

b. There is another reason this Court lacks jurisdiction of the appeal. The three-judge court did not issue an order "denying * * * an * * * injunction" within the meaning of Section 1253.

Not every order of a properly convened three-judge court denying relief is directly appealable, even if it denies an injunction in the literal sense. Guided by the need to avoid a construction of Section 1253 that would frustrate the historic congressional policy of minimizing this Court's mandatory docket, this Court has held that a direct appeal lies from an order of a three-judge court denying an injunction only where the order "rests upon resolution of the merits of the constitutional claim presented below." MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975).

In Baxley, plaintiffs sought to enjoin a state's nuisance law on constitutional grounds. A three-judge court denied relief because it thought that the pendency of a state proceeding precluded federal intervention under the principles of Younger v. Harris, 401 U.S. 37 (1971). Because the three-judge court never reached the merits of plaintiffs' constitutional attack on the state statute, this Court held that it was without jurisdiction to consider plaintiffs' appeal. 420 U.S. at 804. The situation is the same here. The lower court denied relief, not because it found that the state's legislative preference for local control over education constitutionally prohibited a remedy for unlawful interdistrict segregation, but because it found that appellants had not established a current condition of unlawful racial separation. As in Baxley, the three-judge court never reached the merits of the constitutional challenge to the state statutes. This case is therefore controlled by Baxley; this Court should dismiss the appeal on that ground as well.

2. If the Court disagrees with our assessment of the three-judge court question, it should note probable jurisdiction. The issues raised by appellants are substantial ones and deserve the Court's full consideration.

We agree with appellants that the findings made by the district court establish that at least through the mid-1960s, governmental officials at all levels committed constitutional violations with significant interdistrict effects, and that evidence of this sort may furnish a predicate for interdistrict relief. Milliken v. Bradley, 418 U.S. 717, 744-745 (1974); id. at 755 (Stewart, J., concurring).

The basis for the district court's refusal to order relief is not entirely clear. Appellants read the district court as having attached critical importance to the fact that the individual local school districts were operating unitary, or near-unitary, school systems (J.S. 34-35). Much in the court's opinion supports appellants' interpretation of it (App. D, pages 26-27, 32-33). If the court's decision rests on this ground, it is in error: the operation of schools in a manner that reduces the amount of racial separation within each district does nothing to alter the disparity in the racial composition of schools between districts. Assuming arguendo that the court had another basis for its denial of relief, nothing in the court's opinion satisfactorily explains the divergence between the court's findings of constitutional violations and its denial of relief.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. If the Court does not dismiss for lack of jurisdiction, it should note probable jurisdiction.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

APRIL 1980